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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 254

HOMER S. CUMMINGS, Attorney General of the United States, and W. A. JULIAN, as Treasurer of the United States,

Petitioners,

v.

DEUTSCHE BANK UND DISCONTO-GESELLSCHAFT, a Corporation.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

BRIEF FOR THE RESPONDENT

THOMAS H. CREIGHTON, JR.,
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Attorneys.

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IN THE

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OCTOBER TERM, 1936.

HOMER S. CUMMINGS, Attorney General of the United States, and W. A. JULIAN, as Treasurer of the United States, *Petitioners,* v. DEUTSCHE BANK UND DISCONTO-GESELLSCHAFT, a Corporation.	No. 254

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

BRIEF FOR THE RESPONDENT

Opinions Below

The memorandum opinion of the Supreme Court of the District of Columbia (R. 5) is not reported. The opinion of the United States Circuit Court of Appeals for the District of Columbia (R. 8) and the subsequent opinion on motion for rehearing (R. 21) are reported in 83 F. (2d) 554, 562.

Jurisdiction

The opinion of the United States Court of Appeals for the District of Columbia (Groner, *J.*) was rendered February 17, 1936 (R. 8). On motion for rehearing a

per curiam opinion was rendered on May 4, 1936 (R. 21). The petition for writ of certiorari was filed August 3, 1936 and was granted October 12, 1936. The jurisdiction of this Court is invoked under the provision of Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

Statutes Involved

The Trading with the Enemy Act of October 6, 1917 (c. 106, 40 Stat. 411) as amended by the Settlement of War Claims Act of March 10, 1928 (c. 167, 45 Stat. 254), and by other acts (U.S.C., Title 50, Appendix); the pertinent provisions of which are set forth in Appendix A hereto, *infra,* pages i to vii.

Public Resolution No. 53, approved June 27, 1934 (c. 851, 48 Stat. 1267), which is set forth in full in Appendix B hereto, *infra,* pages viii to xi.

The Debt Funding Agreement of 1930, (executed on authority of the Act of June 5, 1930 (Pub. No. 307—71st Congress); the pertinent provisions of which are set forth in Appendix C hereto, *infra,* pages xii to xx.

The Knox-Porter Resolution, also known as Peace Resolution, approved July 2, 1921, (42 Stat. L. Part 2, 105), which is set forth in full in Appendix D hereto, *infra,* pages xxi to xxiv.

Agreement of August 10, 1922, between the United States and Germany for a Mixed Claims Commission (42 Stat. 2200), which is set forth in full in Appendix E hereto, *infra,* pages xxv to xxviii.

Treaty of Berlin (42 Stat. 1939), the pertinent sections of which are set forth in Appendix F hereto, *infra,* pages xxix to xxxv.

Statement

The action is brought under the express authorization of the Trading with the Enemy Act as amended by the Settlement of War Claims Act of 1928 (45 Stat. 254), which directed that there be returned to every German 80% of his or its property which had been seized under the Trading with the Enemy Act (40 Stat. 411), provided he filed a consent to the retention and use by the United States of the remaining 20% of said property.

Plaintiff is a corporation organized and existing under the laws of Germany (R. 1) and its property was seized by the Custodian pursuant to the terms of the Trading with the Enemy Act (R. 2).

Subsequent to the passage of the Settlement of War Claims Act of 1928, plaintiff filed its notice of claim with said Custodian together with the consent to the retention and use by the United States of 20% of its property (R. 2). The return of its property was delayed owing to a warrant of attachment filed in the Supreme Court of the District of Columbia, which was dismissed by a decree of that Court, dated May 24, 1934 (R. 2). Upon said dismissal plaintiff demanded the return to it of 80% of its property (R. 2), but actual payment thereof was withheld until after the enactment of Public Resolution No. 53, 73rd Congress, approved June 27, 1934 (48 Stat. 1267), when defendants set up said Public Resolution as an authorization for the withholding from plaintiff of its property although prior to the enactment of said Public Resolution 53 the Custodian had determined plaintiff was the owner of said property and entitled to the return thereof as provided for by the Trading with the Enemy Act as amended

by the Settlement of War Claims Act of 1928 (R. 3). Thereupon plaintiff instituted the present suit.

Defendants subsequently moved to dismiss the complaint (R. 4). This Motion to Dismiss was based upon Public Resolution No. 53, 73rd Congress, it being claimed that the return of the property of plaintiff, as prayed for in the Bill of Complaint, was, by virtue of said Resolution, prohibited (R. 45).

The text of the Resolution appears in the Appendix hereto, *infra,* pages viii to xi, but its general purport is to the effect that because the German Government is indebted to the United States under a debt-funding agreement between Germany and the United States, dated June 23, 1930, no further returns to individual Germans shall be made under the Settlement of War Claims Act until such time as the German Government shall have paid the amount it is in arrears under such debt-funding agreement of June 23, 1930, and

> "Provided further, That the President may in his sole discretion remove the restriction as to any of the cases or classes of cases * * *,"

and that his determination as to Germany being in arrears

> "shall not be subject to judicial review".

Prior to the enactment of Public Resolution 53, approximately 95% of the property taken by the Alien Property Custodian under the Trading with the Enemy Act, less the retained 20%, had been, under the provisions of the Settlement of War Claims Act of 1928, returned to its former owners of the same class as Deutsche Bank und Disconto-Gesellschaft (R. 12).

Questions Involved

1. Whether Public Resolution 53 operated as a withdrawal by Congress of the right of owners of property to sue for its recovery as provided for by Section 9, as amplified by Section 17, of the Trading with the Enemy Act as amended by the Settlement of War Claims Act of 1928.

2. Whether Public Resolution 53 attempts to deprive Germans who had then become alien friends of their vested right to property conferred upon them by the Settlement of War Claims Act of 1928.

3. Whether said Resolution attempts to confiscate property in time of peace, whereas such power of confiscation exists exclusively in time of war.

4. Whether, as its title and text discloses, the Settlement of War Claims Act of 1928 operated as a final settlement of claims by both Germans and Americans by which each party made certain concessions, by virtue of which rights were created, which cannot now be abrogated unilaterally by Congress.

5. Whether, upon filing its consent as the German owner to the retention of and use by the United States Government of 20% of its property, the plaintiff did not acquire under the Settlement of War Claims Act of 1928 a vested right which could not be affected by the subsequent passage of Public Resolution No. 53 postponing the return of said property until Germany shall comply with the debt-funding agreement of 1930 (Annual Report of Secretary of Treasury for year ended June 30, 1930, p. 341).

6. Whether Congress by vesting arbitrary discretion in the President wholly or partially to nullify Public Resolution No. 53 at his own will by returning property to some owners under the Act and refusing to return to others, unlawfully delegated its legislative power to the President.

7. Whether Public Resolution 53 involves undue discrimination between persons of the same class, by operating against the few Germans who, prior to the passage of said Resolution, filed consents to the retention of twenty per cent. of their property and who had not received their eighty per cent. without attempting to recall the eighty per cent. theretofore paid to the vast majority of Germans.

SUMMARY OF ARGUMENT

I. In view of the absence of any compelling language in Public Resolution No. 53 withdrawing from the former owners the privilege of suing the Attorney General, as successor to the Alien Property Custodian, for the return of their property as provided for by Section 9 of the Trading with the Enemy Act as amended, the consent of the United States to be sued has not been withdrawn.

II. The Settlement of War Claims Act, passed after adjustment by Congress of the claims of American nationals, German ship and patent owners and alien property owners based upon an agreement made between such claimants and owners, being a final disposition of the claims of all three groups, when the German owners filed the consent required by such Act to the temporary retention and use by the United States of 20% of their property, respondent acquired a vested right which cannot be affected by the subsequent passage of Public Resolution No. 53 with-

holding the return of said property until Germany shall comply with the terms of the Debt Funding Agreement of 1930 (Annual Report of Secretary of the Treasury for year ended June 30, 1930, p. 1341).

III. Congress having, by virtue of the Settlement of War Claims Act, refused to avail itself of the privilege, granted by the Treaty of Berlin, of confiscation of the property of former German owners, and having by virtue of the Debt Funding Agreement of 1930 agreed to accept the bonds of the German Government as sole security for the payment of amounts due the United States and its nationals under the Treaty of Peace, simultaneously disavowing the right further to hold the private property as security, respondent is not precluded by such Treaty from questioning the validity of Public Resolution No. 53.

IV. Congress, by vesting arbitrary discretion in the President wholly or partially to nullify Public Resolution No. 53 at his own will by directing the return of property to some owners and refusing it to others, unlawfully delegated its legislative power to the President.

V. Prior to the enactment of Public Resolution No. 53, out of $400,000,000 of property seized, 95% having already been returned under prior acts including the Settlement of War Claims Act, it is improper discrimination to withhold the return of the small balance, including the respondent's property.

ARGUMENT

Preliminary Statement

Succinctly stated, the contention of the respondent is that it has obtained a vested interest in the property here

involved which is protected by the Fifth Amendment to the Constitution and of which it cannot be deprived by Public Resolution 53.

In our view, the argument of petitioners, both as to the jurisdiction of the Courts and as to the alleged constitutionality of Public Resolution 53, ignores, in practical effect, the fundamental proposition that here is involved the question of a vested interest in property, protected by the Fifth Amendment, and immune to legislation which would effectively deprive it of such protection. It is our further view that petitioners' argument necessarily leads to the impossible conclusion that Congress has confiscated and can lawfully confiscate alien property in times of peace.

At the outset, therefore, we think it essential to set forth the history and policy of both the executive and legislative departments of the United States Government with relation to enemy property.

I.

The purpose and intent of both the executive and legislative departments in conformity with the unbroken policy of the United States was not to confiscate enemy property but to return it to the owners thereof.

(a) The purpose and intent of the executive department.

On February 8th, 1917, two months before the United States entered the war, the Secretary of State issued a statement, with Presidential sanction, at a time when Germans and Austrians were beginning to withdraw their

property for fear of its seizure in the event of war with their countries. This statement was as follows:

> "It having been reported to him that there is anxiety in some quarters on the part of persons residing in this country who are the subjects of foreign states lest their bank deposits or other property should be seized in the event of war between the United States and a foreign nation, *the President authorizes the statement that all such fears are entirely unfounded.* The Government of the United States will in no circumstances take advantage of a state of war to take possession of property to which international understandings and the recognized law of the land give it no just claim or title. *It will scrupulously respect all private rights alike of its own citizens and of the subjects of foreign states.*" (Italics ours.)

When the Act known as the "Trading with the Enemy Act" was under consideration, Hon. Robert Lansing, Secretary of State; Hon. William C. Redfield, Secretary of Commerce; Hon. Charles Warren, Assistant Attorney General, and Dr. Edward E. Pratt, Chief of the Bureau of Foreign and Domestic Commerce of the Department of Commerce, under whose direction the act was drawn, appeared before the Committee on Interstate and Foreign Commerce, and on May 29, 1917, explained its object (Hearings before the House Committee on Interstate and Foreign Commerce, p. 13). Secretary Redfield, who spoke for Secretary Lansing in this matter, said in his presence:

> "The creation of an alien property custodian is a novelty and is in line with that same effort toward equity which impels us to indicate an earnest desire to show to the people with whom, unfortunately, we are engaged in war that here is the opposite of confiscation and here is the opposite of requisition."

The Government again on November 14, 1917, in the Official Bulletin of that date (No. 159), published the following announcement over the name of A. Mitchell Palmer, Alien Property Custodian: (Hearings before the Committee on Interstate and Foreign Commerce of House of Representatives, 67th Congress, 4th Session, of January 9, 1923, p. 209):

> "The purposes of Congress are to preserve enemy owned property in the United States from loss and to prevent every use of it which may be hostile and detrimental to the United States * * *. The Alien Property Custodian exercises the authority of a common-law trustee; there is no thought of a confiscation or dissipation of property thus held in trust."

In an address delivered at Philadelphia, November 23, 1923, then Secretary of State Hughes said (Hearings before the Committee on Ways and Means of House of Representatives, 69th Congress, 1st Session, of April 5, 1926, p. 380):

> "A confiscatory policy strikes not only at the interest of particular individuals but at the foundations of international intercourse, for it is only on the basis of the security of property, validly possessed under the laws existing at the time of its acquisition, that the conduct of activities in helpful cooperation, is possible. * * * Rights acquired under its laws by citizens of another state, [a state] is under an international obligation appropriately to recognize. It is the policy of the United States to support these fundamental principles."

In *Techt* v. *Hughes*, 229 N. Y. 222, Judge Cardozo stated at pages 244, 245:

> "The plaintiff is a resident; but even if she were a non-resident, and were within the hostile terri-

tory, the policy of the nation would not divest her of the title whether acquired before the war or later. Custody would then be assumed by the alien property custodian. The proceeds of the property, in the event of sale, would be kept within the jurisdiction. Title, however, would be unchanged, in default of the later exercise by Congress of the power of confiscation (40 Stat. ch. 106, pp. 416, 424), now seldom brought into play in the practice of enlightened nations (2 Westlake Int. L. 46, 47; *Brown* v. *U. S.*, 8 Cranch. 110)."

(b) The purpose and intent of Congress as established by the legislative history and actions of the United States relative to alien property.

1. THE TRADING WITH THE ENEMY ACT OF OCTOBER 6, 1917.

When the Trading with the Enemy Act was originally enacted the report of the Committee on Commerce, 65th Congress, 1st session, Report No. 113, contained the following statement:

> "* * * Under the old rule warring nations did not respect the property rights of their enemies, but a more enlightened opinion prevails at the present time, and it is now thought to be entirely proper to use the property of enemies without confiscating it; * * *.
>
> "While the theory on which the bill is drafted is that enemy property shall be protected and utilized, but not confiscated, the ultimate disposition of the enemy property received and held by the Government is left entirely to Congress, and provision is made that after the end of the war enemy claims

> to such property 'shall be settled as Congress shall direct'. "

And agreeable with the intent of Congress as expressed by the Committee, not one word will be found in the Trading with the Enemy Act of October 6, 1917, which even suggests confiscation. The property was to be seized and held by a custodian who was to hold, administer and account for the property until Congress should direct the settlement of any claim of any enemy to the property.

Section 12 of this Act provided as follows:

> "After the end of the war any claim of any enemy, or of an ally of enemy, to any money or other property received and held by the Alien Property Custodian, or deposited in the United States Treasury, shall be settled as Congress shall direct: * * *".

2. RETURNS AUTHORIZED PRIOR TO JULY 2, 1921.

As is well known, Congress very early after the cessation of hostilities began by legislation the direction of the return of property to former enemy owners. In 1919 Section 9 of the Act was amended to permit the return to those persons who were enemies solely by reason of residence in the territory of a nation associated with the United States in the prosecution of the war which was occupied by the military or naval forces of Germany or Austria-Hungary (41 Stat. L. 35). In 1920 the Act was further amended to permit the return to citizens of Czechoslovakia and other countries who were, at the time of the seizure, citizens of Austria-Hungary and therefore enemies; to American wives of Germans; to former dip-

lomatic officials of Germany and Austria-Hungary whose property was in this country by reason of the service of such officials; to the governments of Bulgaria or Turkey; to the governments of Germany or Austria, or Austria-Hungary where the money or other property was the diplomatic or consular property of such government (41 Stat. L. 977).

3. The Knox-Porter Peace Resolution of July 2, 1921.

By Public Resolution No. 8 of July 2, 1921 (c. 40, 42 Stat. 105) the war was declared at an end. Section 5 specifically provides, as to alien property, as follows:

> "All property * * * of all German nationals which was, on April 6, 1917, in or has since that date come into the possession or under control of, or has been the subject of a demand by the United States of America or of any of its officers, agents, or employees, from any source or by any agency whatsoever * * * shall be retained by the United States of America and no disposition thereof made, except as shall have been heretofore or specifically hereafter shall be provided by law until such time as the Imperial German Government * * * or their successor or successors, *shall have* * * * *made suitable provision* for the satisfaction of all claims against said Government(s), * * *, of all persons, wheresoever domiciled, who owe permanent allegiance to the United States of America and who have suffered, through the acts of the Imperial German Government, or its agents, * * * since July 31, 1914, loss, damage, or injury to their persons or property, directly or indirectly, whether through the ownership of shares of stock in German,

> * * *, American, or other corporations, or in consequence of hostilities or of any operations of war, or otherwise, * * *, until the Imperial German Government * * * or their successor or successors shall have * * * confirmed to the United States of America all fines, forfeitures, penalties, and seizures imposed or made by the United States of America during the war, whether in respect to the property of * * * German nationals * * *, and shall have waived any and all pecuniary claims against the United States of America". (Italics ours.)

Speaking of this provision, Senator Knox, who had charge of the bill, stated (Cong. Record, Vol. 61, Part 4, Page 3249):

> "The purpose of the joint resolution is simply to hold in *status quo* the things that have been done by the Alien Property Custodian. The joint resolution simply states that until a *suitable adjustment has been made of the claims of American citizens against Germany* for the property that has been seized by Germany, the property in the hands of the Alien Property Custodian shall be held until Congress shall dispose of it.
>
> I do not know whether I have quite answered the question that has been propounded by the Senator from North Dakota, but what I have stated is the whole theory of the joint resolution, *not that we are in any way comitting ourselves to the proposition that we are going to retain alien enemy property, but that we are going to retain it only until suitable provision has been made for the satisfaction of American claims against Germany and against Austria".* (Italics ours.)

The very interesting debates in Congress, in which such able Senators, among others, as Senators Reed, Pomerene,

Borah, and Knox participated, will be found in Congressional Record, Vol. 61, Part I, pages 785-791; pages 850-852; and Part IV, page 3249.

4. The Treaty of Berlin of 1921.

The Treaty of Berlin (42 Stat. 1939) was executed on August 25, 1921 and proclaimed on November 14, 1921. Part and parcel of the Treaty is the above quoted Section 5 of said Peace Resolution of July 2, 1921.

5. The Agreement of August 10, 1922 for a Mixed Claims Commission.

By an agreement of August 10, 1922, Germany and the United States set up a Mixed Claims Commission to determine the amount of the claims of the United States and its nationals against Germany. The Agreement begins:

> "The United States of America and Germany, being desirous of determining the amount to be paid by Germany in satisfaction of Germany's financial obligations under the Treaty concluded by the two Governments on August 25, 1921, which secures to the United States and its nationals rights specified under a resolution of the Congress of the United States of July 2, 1921, including rights under the Treaty of Versailles, have resolved to submit the questions for decision to a mixed commission * * *."

As is well known, the Mixed Claims Commission was organized and sat and adjudicated claims thereafter for several years.

6. Act of March 4, 1923, known as the Winslow Act.

On March 4, 1923, the President approved an act of Congress amending the Trading with the Enemy Act known as the Winslow Act (42 Stat. 1511).

This act directed the return of all the property held by the Alien Property Custodian to certain classes of claimants and up to $10,000 to each German owner, and further provided:

> "Sec. 23. The Alien Property Custodian is directed to pay to the person entitled thereto from and after the time this section takes effect, the net income, dividends, interest, annuity, or other earnings accruing and collected thereafter *on any property or money held in trust for such person* by the Alien Property Custodian, or the Treasurer of the United States for the account of the Alien Property Custodian, * * *; but no person shall be paid under this section any amount in excess of $10,000 per annum".
>
> Sec. 24. The Alien Property Custodian is authorized to pay all taxes * * * lawfully assessed by any body politic, against any money or other property held by him * * * under this act * * *. Such taxes and expenses shall be paid out of the money or other property against which such taxes are assessed * * * or, (if such money or other property is insufficient) out of any other money or property *held for the same person,* * * *." (Italics ours.)

7. The Settlement of War Claims Act of March 10, 1928.

By reason of the functioning of the Mixed Claims Commission since 1922, the amount of the claims of American

nationals against Germany was rather definitely known by 1928. Also by that time the amount which the United States was willing to pay on claims of German citizens against this Government on account of German Merchant ships, patents and radio stations seized during the war was definitely known.

Accordingly, Congress enacted the Settlement of War Claims Act of March 10, 1928 (45 Stat. 254) which, as its title indicates, provided "for the settlement of certain claims of American nationals against Germany * * * and nationals of Germany * * * against the United States, *and for the ultimate return of all property held by the Alien Property Custodian*".

It was not possible, however, to provide for the immediate payment of all claims in full. Accordingly, Congress provided for the immediate payment in full of all awards of the Mixed Claims Commission to American nationals of less than $100,000, for the payment of $100,000 to each of those to whom awards of more than $100,000 had been made, and for the payment of 80% of the balance remaining unpaid upon the awards in excess of $100,000.

It also provided for the immediate return to the German owners of 80% of their property held by the Alien Property Custodian on condition that they consent to the retention and use by the United States of the remaining 20%.

It provided for a Special Deposit Account in which was deposited 20% of German property in the hands of the Alien Property Custodian pursuant to the consent of the owners thereof, amounts which had been paid by Germany on account of awards of the Mixed Claims Commission and amounts which would thereafter be paid by Germany, interest which had been earned on Germany moneys in the hands of the Alien Property Custodian for the period from the

date of its seizure to March 4, 1923, and the amount appropriated by Congress for the payment of German claims for ships, patents and radio stations.

From this account there was to be paid in the order mentioned above the awards of the Mixed Claims Commission together with 50% of the amounts awarded to the German ship and patent owners.

Other payments after those enumerated above were provided for. (See Section 4, Settlement of War Claims Act of 1928.)

The Settlement of War Claims Act was enacted as a result of the fact that Congress had determined that Germany had made "suitable provision" for the satisfaction of American claims.

8. The Debt-Funding Agreement of 1930.

The Mixed Claims Commission had nothing to do with the ascertainment or awarding of the costs of the American army of occupation. And the Settlement of War Claims Act of 1928 made no provision for the payment of the costs of the American army of occupation.

On March 4, 1930, the President of the United States sent the following letter to Congress:

> "To the Congress of the United States:
>
> I am submitting herewith for your consideration a copy of the report of the Secretary of the Treasury regarding the proposed agreement and exchange of notes with Germany *for the complete and final* ***discharge of the obligations of that Government to*** *the United States* with respect to the awards made

by the Mixed Claims Commission, United States and Germany, and for the costs of this Government's army of occupation.

The plan of settlement has my approval, and I recommend that the Congress enact the necessary legislation authorizing it.

HERBERT HOOVER.

THE WHITE HOUSE, March 4, 1930." (Italics ours.)

Document 95, 71st Congress, 2d Session.

In the report of the Senate Committee on Finance, (Report No. 733, 71st Congress, 2nd Session) accompanying the bill, it quoted from a statement of Undersecretary of Treasury Mills, as follows:

> "The bill now before you for consideration authorizes the Secretary of the Treasury, with the approval of the President, to enter into an agreement with Germany, as set out in general terms in the bill, providing for the complete and final discharge of the obligations of Germany to the United States in respect of the awards of the Mixed Claims Commission, United States and Germany, and the costs of the United States Army of Occupation."

The Act of June 5, 1930 (Pub. No. 307—71st Congress) authorized the execution of such a Debt-Funding Agreement between the United States and Germany. Pursuant to said authority, such Agreement was entered into on June 23, 1930 (Annual Report of Secretary of Treasury for year ending June 30, 1930, pp. 341-347).

In the Preamble thereof, it is recited that Germany is obligated to pay the awards of the Mixed Claims Com-

mission; that it is also obligated to pay the costs of the American army of occupation; that Germany has made payments on the account of such obligations; and that the parties "desire to make arrangements for the complete and final discharge of said obligations".

By Par. 1, Germany agreed to pay 40,800,000 reichsmarks per year until March 31, 1981 in payment of the awards of the Mixed Claims Commission and other millions of reichsmarks per year as set forth in the Agreement until September 30, 1965 in payment of the costs of the American army of occupation. In the case of both classes of payments, it was agreed that the United States would accept the bonds of Germany as sole security for the debt.

By Par. 4, it was agreed that:

> "The United States hereby agrees to accept the full faith and credit of Germany as the only security and guaranty for the fulfillment of Germany's obligations hereunder".

In notes which were exchanged between the two governments coincident with the execution of the Agreement, it is provided:

> "(a) In respect of the acceptance by the United States of the full faith and credit of Germany as the only security and guaranty for the fulfillment of Germany's obligations under the agreement, Germany will be in the same position as the principal debtors of the United States under the debt funding agreements which exist between them and the United States.
>
> (b) Nothing contained therein shall be construed as requiring the United States to release any

German property which it now holds other than as heretofore or hereafter authorized by the Congress of the United States."

This was designed conclusively to discharge the private property as a pledge for Germany's public debt to the United States, and to keep the two questions permanently separate and distinct.

9. Returns under the Settlement of War Claims Act.

After the enactment of the Settlement of War Claims Act of 1928, and prior to the enactment of Public Resolution 53 on June 27, 1934, all of the German property amounting to hundreds of millions of dollars and representing 80% of the German property held by the Alien Property Custodian was returned to the owners, except only a few millions of dollars amounting to about 5% of the property returnable under the Act (R. 12).

10. Summary.

By way of summary, we emphasize that the legislation, including the treaties and agreements, shows conclusively:

(a) That it was the avowed intent and purpose of Congress not to confiscate the property.

(b) That the Trading with the Enemy Act of October 6, 1917, did not purport to effect a confiscation of the property.

(c) That the entire purpose, intent, and expression of the Act was merely to hold the property until the further direction of Congress.

(d) That the purpose of Congress to hold the property as security for claims against Germany was clearly limited in the Peace Resolution of July 2, 1921 to such time as Germany made suitable provision for the payment of the claims.

(e) That such purpose was incorporated in and made a part of the Treaty of Berlin of August 25, 1921.

(f) That, aside from reparations payments being made to the United States by Germany, the first step in such suitable provision was the Mixed Claims Agreement of 1922.

(g) That in recognition of the satisfactory progress of suitable arrangements by Germany, Congress, by the Winslow Act of 1923, released to each owner having less than $10,000 all of his property, released $10,000 to each of the other owners, and released income annually thereafter up to $10,000.

(h) That, in 1928, when the amounts of the claims were ascertained, and when there was about $138,000,000 available for payment of claims, Congress, by the Settlement of War Claims Act of March 10, 1928, determined definitely and conclusively that suitable arrangements had been made and, therefore, provided for the immediate release of 80% of the property.

(i) That by the Debt-Funding Agreement of 1930 Congress, in further recognition of the fact that by the Settlement of War Claims Act of 1928 it had given up its

control over 80% of the property and relinquished its right to hold it as security for awards made by the Mixed Claims Commission agreed to and did accept the full faith and credit of Germany as the only security and guaranty for Germany's obligations and agreed to and did accept the bonds of Germany in evidence of such obligation.

(j) That all control of 80% of the property, theretofore enjoyed by Congress, was, by the Settlement of War Claims Act of 1928, effectively and irrevocably surrendered and such surrender was, by the Debt-Funding Agreement of 1930, emphasized and reiterated.

II.

The Courts have jurisdiction of this action.

(a) The remedy of respondent.

The remedy afforded to respondent is found in the express provisions of the Trading with the Enemy Act (Appendix 50, U.S.C.A., 189). By subsection 13 of Section 9(b) thereof (Appendix 50, U.S.C.A., 245), respondent and those in its class became entitled to the return of their property under the condition, as provided in Section 9(m) (Appendix 50, U.S.C.A., 247-248), that they "file a written consent to a postponement of the return of an amount equal to 20 per centum of the aggregate value of such money or other property". By Section 9(c) (Appendix 50, U.S.C.A., 246) it is provided that respondent may file a notice of claim for the return of the property as provided in section 9(a) (Appendix 50, U.S.C.A., 241) and "may institute suit in equity to recover such money or other property, as provided in said subsection and with like effect."

By Section 9(a) (Appendix 50, U.S.C.A., 241), it is provided that a claimant shall file a notice of claim with the Alien Property Custodian and may make application to the President for the return and that the President may order the return. It then provides:

> "If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia * * * (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled."

This suit has been so instituted in "the Supreme Court of the District of Columbia". It is alleged that the Alien Property Custodian seized the property of respondent as described in the Bill of Complaint (R. 2); that the respondent filed its notice of claim with the Alien Property Custodian (R. 2); that the Alien Property Custodian determined that respondent was entitled to the return of the property (R. 2); that, though demand has been made therefor, he has failed and refused to order the return thereof (R. 2-3); that the assigned reason for such failure and refusal to order the return was Public Resolution 53 (R. 3); and that Public Resolution 53 is unconstitutional (R. 4).

Thus, it will be seen that jurisdiction is specifically conferred upon the courts by the provisions of the Trading with the Enemy Act and that this suit is brought and clearly maintainable under the provisions of that Act.

(b) Public Resolution 53 does not withdraw the consent of the United States to be sued.

Public Resolution No. 53 does not contain any language forbidding the maintenance of actions. It simply forbids the return of any further property while Germany is in default.

If the Act is a nullity, and the provisions of the Settlement of War Claims Act are operative, since that Act expressly permits the bringing of an action to recover property, and since Public Resolution No. 53 does not forbid the bringing of any action, but merely directs that no further property shall be returned, it cannot properly be claimed by the petitioners that Congress has expressly forbidden the maintenance of this present action.

In the very recent case of *Becker Steel Company of America* v. *Cummings, et al.,* 296 U. S. 74, this Court said (p. 80):

> "Only compelling language in the congressional enactment will be construed as withdrawing or curtailing the privilege of suit against the government granted in recognition of an obligation imposed by the Constitution. See *Lynch* v. *United States,* 292 U. S. 571, 586, 587; *Russian Volunteer Fleet* v. *United States,* 282 U. S. 481, 489. *Hence Section 9 (a) must be broadly construed to give effect to its remedial purpose,* see *Miller* v. *Robertson,* 266 U. S. 243, 248; *Behn Meyer & Co.* v. *Miller,* 266 U. S. 457, 471, 472." (Italics ours.)

If Congress had intended to deprive German owners of the right to sue, Congress would have used express language to that effect. Such express language was used in the Independent Offices Appropriation Act for 1935, which expressly provides, with respect to the 2% deduction for expenses as follows (48 Stat. 509, 510):

> "* * * nor shall any suit be instituted or maintained against the Alien Property Custodian * * *".

In the case of *Lynch* v. *United States*, 292 U. S. 571, this Court held that unless the right to sue was expressly taken by Congress from a war risk insurance claimant such claimant could not be deprived of his rights under a war risk policy by an unconstitutional repudiation of a contract by a statute providing for nonpayment of the policy. Its language on this subject is as follows (p. 583):

> "The question requiring decision is, therefore, whether in repealing 'all laws granting or pertaining to yearly renewable term insurance' Congress aimed at the right or merely at the remedy. It seems clear that it intended to take away the right; and that Congress did not intend to preserve the right and merely withdraw consent to sue the United States. As Congress took away the contractual right, it had no occasion to provide for withdrawal of the remedy. Moreover, it appears both from the language of the repealing clause and from the context of section 17 that Congress did not aim at the remedy. The clause makes no mention of consent to sue. The consent to sue had been given originally by section 405 of the Act of 1917 (40 Stat. 410), which, like the later substituted sections, applied to all kinds of insurance, making no specific reference to yearly renewable term policies. Obvi-

ously Congress did not intend to repeal generally the section providing for suits."

(c) The property has not been covered into the Treasury.

Notwithstanding the clear provisions of the Trading with the Enemy Act as amended, and notwithstanding that there is no language in Public Resolution 53 withdrawing the consent of the United States to be sued, petitioners argue (nevertheless) that the courts are without jurisdiction and they do so upon hypotheses which, we submit, ignore the fundamental issue that Public Resolution 53 is unconstitutional.

They first say that the Resolution prohibits payments of either money or property "whether or not a judgment or decree has been entered with respect thereto"; that Article I, Section 9, Clause 7 of the Constitution provides that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law"; and that "this Court has frequently decided that no judgment or decree of any court can compel the payment of money from the Treasury unless there has been an authorization by Congress".

There is, of course, no question that the Courts cannot compel the payments of money out of the Treasury in violation of the Constitution. But petitioners ignore the fact that this money has never been covered into the Treasury.

It is true that Section 12 of the Act (Appendix 50, U. S. C. A. 278) provides that monies seized by the Alien Property Custodian "shall be deposited forthwith in the Treasury of the United States". But it is also true and obvi-

ous that they are not deposited in the Treasury as revenues or monies of the United States. They are monies held in trust, marked and identified as trusts, in the names of the owners, held as such pending a determination by Congress as to their disposition, and have been constantly and in the millions paid out as Congress has directed and without appropriations. In Section 9 (a) it is provided that when suit is instituted thereunder, the money shall be retained "in the Treasury of the United States as provided in this Act" until final judgment is satisfied by payment "on order of the Court". Obviously, there was no intent or purpose that the monies should be covered into the Treasury to be drawn therefrom by congressional appropriations and such has not been the practice from the inception of the Act until this day.

The Abandoned and Captured Property Act of July 2, 1864 (13 Stat. 375) provided that monies realized from abandoned and captured property should "be paid into the Treasury of the United States". Construing that provision, this Court held in the case of *United States* v. *Johnston,* 124 U. S. 236, 252, that such money was not "technically, in departmental language, 'covered into the Treasury,' " and that it was not subject to the provisions of Art. I, Sec. 9, Cl. 7 of the Constitution. And this Court, in support of its construction, cited the fact that millions had been paid out without any appropriation therefor (p. 253).

Section 12 of the Trading with the Enemy Act provides that (50 U. S. C. A. Appendix, p. 278):

> "All moneys (including checks and drafts payable on demand) paid to or received by the alien property custodian pursuant to this Act shall be deposited forthwith in the Treasury of the United States, and may be invested and reinvested by the

> Secretary of the Treasury in United States bonds or United States certificates of indebtedness, under such rules and regulations as the President shall prescribe for such deposit, investment, and sale of securities; * * *"

Under this section of the Trading with the Enemy Act, President Wilson issued an Executive order dated February 26, 1918, reading in part as follows (Meares, Trading with the Enemy Act, p. 592):

> "Any and all moneys so deposited in the Treasury of the United States, as herein provided, as well as all moneys, if any, which may be paid to the Treasurer of the United States, as provided in Section 12 of said Act, and all interest, dividends or other income, if any, in respect of any property conveyed, transferred, assigned or delivered to the Treasurer of the United States, as provided in said Section 12, shall be credited by the Treasurer of the United States to the Secretary of the Treasury 'for account of the Alien Property Custodian.'
>
> "Any and all money so deposited in the Treasury of the United States, as herein provided, together with any interest or income received from the investment thereof, shall be subject to withdrawal by the Secretary of the Treasury for the purpose of making any payment or payments pursuant to the provisions of said Act, and, until so withdrawn, may be invested and reinvested, from time to time, by the Secretary of the Treasury in United States bonds or United States certificates of indebtedness."

In January 1926, the Alien Property Custodian inquired of Attorney General Sargent as to whether he had the power to return money which had been deposited in the Treasury and whether the Secretary of the Treasury should

draw checks as requested by him. On March 4, 1926, the Attorney General, in an opinion which is not published, replied:

> "In regard to the second question presented, the Act provides that the moneys received by the Custodian in pursuance thereof shall be deposited forthwith in the Treasury of the United States under such rules and regulations as the President shall prescribe. The Executive Order of February 26, 1918, provided that said moneys shall be deposited in the Treasury of the United States through the office of the Secretary of the Treasury; and that all such moneys so deposited shall be subject to withdrawal by the Secretary of the Treasury for the purpose of making any payments pursuant to the provisions of said Act and until so withdrawn shall be held by the Secretary of the Treasury for account of the Alien Property Custodian. In view of your statement that these moneys were deposited in the Treasury in accordance with Section 12 of said Act, it is assumed that they have not been covered into the Treasury by warrant within the meaning of Section 305 R. S. such as to constitute them public moneys. If such were the case they could not be withdrawn except by the express authority of Congress. Constitution, Art. 1.
>
> "In *Rice, assignee* v. *United States,* 21 C. Cls. 413, it was said by Richardson, *C. J.,* who was entirely familiar with the mode of conducting business in the Treasury Department, that 'while Mr. Chase was Secretary of the Treasury and for sometime afterwards the money received from captured and abandoned property was merely *deposited with the Treasurer* and was not technically, in Departmental language, 'covered into the Treasury'; and so, according to the construction then given by the De-

> partment was not subject to the Constitutional provisions that 'no money shall be drawn from the Treasury but in consequence of appropriation made by law'. This case was cited and followed by the Supreme Court of the United States in *United States* v. *Johnston,* 124 U. S. 236."

In the annual reports of the Secretary of the Treasury, the moneys deposited by the Alien Property Custodian are reported with the following caption:

"Alien property trust fund"

(See Annual Report of the Secretary of the Treasury on the State of Finances for the Fiscal Year Ended June 30, 1935, page 79).

We think it too clear for extended argument that, from the entire purpose and intent of the Act, from the provisions thereof, from the long continued practice thereunder in which hundreds of millions have been paid out without appropriations, and from the decisions of this and other Courts, the monies here involved were not intended to be and have not been covered into the Treasury and are not subject to the provisions of Art. I, Sec. 9, Cl. 7 of the Constitution.

With reference to the stocks and bonds here involved, petitioners argue that the Congress has power over them under Art. IV, Sec. 3, Cl. 2 of the Constitution as property of the United States. But, it is at once apparent that Congress did not intend to confiscate and has not confiscated the property. Like the money, it is held in trust, identified as trust property, and Congress has directed its return. It is not property of the United States subject to the provisions of Art. IV, Sec. 3, Cl. 2 anymore than is the money subject to the provisions of Art. I, Sec. 9, Cl. 7.

(d) The prohibition of Public Resolution 53 against payments "whether or not a judgment or decree has been entered" does not destroy the jurisdiction of the Courts.

In their attack upon the jurisdiction of the Courts, petitioners next contend (Brief, page 15) that "Congress, by the Resolution prohibiting payment of any judgment, has effectively destroyed the jurisdiction of any court exercising true judicial power".

This Court, in the case of *Nashville, Chattanooga & St. Louis Railway* v. *Roy C. Wallace,* 288 U. S. 249, holding actions for declaratory judgments to be controversies within the meaning of the Constitution, demonstrated quite clearly that a provision for payment of a judgment is not an essential feature of a judgment. Referring to the case of *U. S.* v. *Jones,* 119 U. S. 477, to the effect that this Court can entertain an appeal from a judgment of the Court of Claims, even though such judgment is not enforceable without a specific appropriation of Congress, this Court stated (page 263) that it has often exerted its judicial power:

> "* * * to review judgments of the Court of Claims although no process issues against the Government * * *".

The cases referred to by the Government in no way apply.

Hayburn's Case, 2 Dall. 409, was an attempted appeal from a decision of a Circuit Judge appointed under an act of Congress requiring the Circuit Courts of the United States to examine into various claims. The opinions of the judges were not final but reviewable by an executive office. Therefore, this Court held that their duties were not judicial.

Similarly, in *U. S.* v. *Ferreira,* 13 How. 40, 46, a district judge of Florida was authorized to adjudicate claims against the United States. His decision was subject to review by the Secretary of War and this Court again declared the power conferred upon such a judge as not judicial within the meaning of the Constitution.

And so likewise, in the case of *Gordon* v. *U. S.,* 117 U. S. 697, where Judge Taney held that this Court did not have jurisdiction to review a judgment of the Court of Claims, when such judgment was subject to review by the Secretary of the Treasury. Afterwards, when such right of review was taken away from the Treasury Department by Congress, the judgment of the Court of Claims was held reviewable by this Court. *U. S.* v. *Jones,* 119 U. S. 477.

The decision in the case of *District of Columbia* v. *Eslin,* 183 U. S. 62, likewise, is inapplicable. In that case the plaintiffs, contractors with the District of Columbia, were awarded under an act of Congress of February 13, 1895 (28 Stat. 664) certain rates of compensation established by the board of public works. These were gratuities awarded by Congress. Subsequently, Congress passed the act of March 3d, 1897, chap. 387, providing that the act of February 13, 1895, allowing the aforesaid rates,

> "be, and the same is hereby repealed, and *all proceedings pending shall be vacated,* and no judgment heretofore rendered in pursuance of said act shall be paid." 29 Stat. 665, 669. (Italics ours.)

The same Statute was construed in *In re Hall,* 167 U. S. 38, where the court said (pp. 42-43):

> "This court had just decided that the act of February 13, 1895, 28 Stat. 644, simply conferred a gratuity upon the persons covered by its provisions; that there was no element of a legal or an equitable claim in their favor against the municipal authorities of the District, but that the act provided for a gift which was wholly without consideration. The repeal of the act took away all jurisdiction in the Court of Claims to proceed further, so far as concerned any rights founded upon the act so repealed."

The Court will note the language of the statute in the *Eslin* case which provided that

> "all proceedings pending shall be vacated".

In the present statute, no such language appears vacating all pending proceedings.

As we stated in a previous part of this Brief, had Congress intended to take away all remedy whatsoever, it could easily have used such express language. Furthermore, the language forbidding payment cannot deprive the former owners of their constitutional right.

In the case of *Lynch* v. *U. S.*, 292 U. S. 571, Section 17 of the Economy Act of March 20, 1933 (48 Stat. 11) (38 U.S.C.A., §§ 717, 718), commonly known as the Economy Act, is referred to, and provides (p. 584):

> "* * * all laws granting or pertaining to yearly renewal term insurance are hereby repealed, but payments in accordance with such laws shall continue to the last day of the third calendar month following the month during which this chapter is enacted."

Implicit in this language, coupled with the declared purpose of the "Economy Act", is the intent to discontinue payments after the last day of the third calendar month. The aim of the Act was to relieve the Government of the obligation to make further payments on the repealed insurance. Nevertheless, this Court held that the Act attempted an unconstitutional revocation of the rights of beneficiaries and did not constitute a withdrawal of the right to sue.

Consequently, in the absence of express language taking away the privilege of suit, if the rights of the plaintiffs are vested, the forbidding of payment does not deprive the plaintiffs of their rights as friendly aliens to invoke the jurisdiction of this Court and of the court below.

(e) Public Resolution 53 may not be construed as a withdrawal of the right to sue the United States.

Next the petitioners contend that Public Resolution 53 was intended by Congress as a withdrawal of the consent of the United States to be sued.

We have hereinbefore pointed out that the jurisdiction conferred on the courts by the Act was in no way limited or destroyed by Public Resolution 53 and that there is no language in the Resolution expressive of such limitation or destruction.

Congress could not intend, as the necessary deductions from petitioners' argument would imply, to deprive claimants of their constitutional rights by the passage of an unconstitutional Resolution. The argument leads to the impossible assumption that Congress, and Congress alone, should be the judge of the constitutionality of its Acts.

As was said by this Court in *Lynch* v. *United States*, 292 U. S. 571, 587:

> "But it is not to be assumed that Congress would have resorted to the device of withdrawing the legal remedy from beneficiaries of outstanding yearly renewable term policies if it had realized *that these had contractual rights.*" (Italics ours.)

So also in this case "it is not to be assumed that Congress would have resorted to the device of withdrawing the legal remedy from" those having vested rights in the property "if it had realized that these had contractual rights".

Furthermore there is not a word in the Resolution to show that Congress withdrew, or intended to withdraw, the right to sue. As the Court below stated (R. 13):

> "But, as we have pointed out, Section 11 of the Settlement of War Claims Act of 1928, authorizing former enemy owners to proceed under subsection (a) of Sec. 9 of the Trading with the Enemy Act, specifically gives a right of action to such enemy owners to proceed in the Supreme Court of the District of Columbia to establish their claims and to have a final decree for restoration. And while, as we think, Congress retained the power to withdraw the consent at any time—*Lynch* v. *United States*, 292 U. S. 571, 581—until withdrawn the privilege to sue cannot be challenged. And, in the view we take of the language used by Congress in the Resolution, nothing there can be said to constitute a withdrawal of consent. Certainly there is no apt language used to that effect. And we take it to be true that the same formality necessary to create the right is equally necessary to its withdrawal. The Resolution is not confiscatory of the property here in suit.

It is not, as we think, a withdrawal of consent to be sued."

(f) The consent to sue, Section 9 of the Trading with the Enemy Act, expressly grants the privilege of suit in order to obtain payment.

The Trading with the Enemy Act, by Section 9 as amended, authorizes claimants to

> "* * * institute a suit in equity in the Supreme Court of the District of Columbia * * * to establish the interest, right, title, or debt so claimed, *and if so established the court shall* order the payment * * *." (Italics ours.)

According to petitioners, Section 9 has for its sole object the obtaining of a declaratory judgment. The Government in its brief, contends that the apparent object of the Trading with the Enemy Act, referring to this section, was (pp. 23-24):

> "to allow a suit to be instituted only where it was necessary for the claimant to establish its right, title and interest; that is, judicial determination was provided when a question of ownership was in issue."

Section 9 was inserted in the original Trading with the Enemy Act largely for the purpose of giving to a non-enemy owner or a person whose property was wrongfully seized the privilege of going into court and obtaining the return of his property thus wrongfully seized. It was this section of the Act which prevented the Trading with the Enemy Act from being unconstitutional.

It was with reference to this section of the Trading with the Enemy Act that this Court in the case of *Stochr* v. *Wal-*

lace, 255 U. S. 239, held that during the War the Executive had the privilege of first determining what was enemy property and then seizing it, and in case of wrongful seizure, the owner was accorded the privilege of bringing a proceeding under Section 9 of the Trading with the Enemy Act to obtain the property thus wrongfully seized. Referring to this Section of the Trading with the Enemy Act this Court said as follows (pp. 245-246):

> "That Congress in time of war may authorize and provide for the seizure and sequestration through executive channels of property believed to be enemy-owned, if adequate provision be made for a return in case of mistake, is not debatable. *Central Union Trust Co.* v. *Garvan, supra.* There is no warrant for saying that the enemy ownership must be determined judicially before the property can be seized; and the practice has been the other way. The present act commits the determination of that question to the President, or the representative through whom he acts, but it does not make his action final. On the contrary, it distinctly reserves to any claimant who is neither an enemy nor an ally of an enemy a right to assert and establish his claim by a suit in equity unembarrassed by the precedent executive determination. Not only so, but pending the suit, which the claimant may bring as promptly after the seizure as he chooses, the property is to be retained by the Custodian to abide the result and, if the claimant prevails, is to be forthwith returned to him. Thus there is provision for the return of property mistakenly sequestered; and we have no hesitation in pronouncing it adequate, for it enables the claimant as of right, to obtain a full hearing on his claim in a court having power to enforce it if found meritorious."

To contend that Section 9 of the Trading with the Enemy Act has for its sole object a declaratory judgment, and does not give the courts mentioned in the Act the power to enforce these provisions, is contradicted by Section 17 of the Act which reads as follows:

> "The district courts of the United States are hereby given jurisdiction to make and enter all such rules as to notice and otherwise, and all such orders and decrees, and to issue such process as may be necessary and proper in the premises *to enforce the provisions of this Act*, with a right of appeal from the final order or decree of such court as provided in sections one hundred and twenty-eight and two hundred and thirty-eight of the Act of March third, nineteen hundred and eleven, entitled 'An Act to codify, revise, and amend the laws relating to the judiciary' (sections 225 and 345 of Title 28 Judicial Code and Judiciary)."

The petitioners says that the plaintiff is asking for a mandamus. Plaintiff is not asking for a mandamus. It is asking for a return of its own property (so determined by the petitioners), in accordance with the language of subsection (a) of Section 9, which provides that the court shall

> "order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, * * *."

III.

Public Resolution 53 is unconstitutional in that it deprives respondent of a vested right in property, acquired under the Settlement of War Claims Act of 1928, contrary to the Fifth Amendment to the Constitution of the United States.

(a) Events leading up to the Settlement of War Claims Act of March 10, 1928.

It is here to be emphasized, as we pointed out hereinbefore, that Section 5 of the Knox-Porter Peace Resolution of July 2, 1921 (quoted *ante*, pp. 13-14) provided for the holding of the property until Germany "shall have * * * made suitable provision for the satisfaction of all claims" and that such provision was incorporated in and made a part of the Treaty of Berlin of August 25, 1921.

We have also pointed out that subsequent to the Treaty and on August 10, 1922, an agreement was made between the United States and Germany whereby a Mixed Claims Commission was set up for the ascertainment of all claims of American Nationals against Germany.

Then, we have pointed out that as it became apparent that Germany was making provision for the satisfaction of claims, Congress began actively to return property which had theretofore been enemy property under the Act. Notably, by the Winslow Act of 1923, Congress very definitely evinced a relaxation of its right to hold and control the property as security for the payment of American claims by providing for substantial returns to Germans.

Finally, we have pointed out that, by 1928, the amount of the claims of American citizens was rather definitely determined by the Mixed Claims Commission. What, then, was the purpose of the Settlement of War Claims Act? Granting that, in 1928, we still had the privilege to hold the property as security for the payment of claims, what, in fact, was the purpose of the Settlement Act and what was the legal result thereof? In fine, the question resolves itself into one of not what the United States might have done under Sec. 2 of the Treaty of Berlin but rather what did it do notwithstanding reserved powers under Sec. 2 of that Treaty.

After all, the whole burden of the legislation is predicated upon the power of Congress to hold the property and to direct its return. Congress announced, on July 2, 1921, that it proposed to hold the property until Germany should make suitable provision for the payment of American claims. The Settlement Act itself is devoid of any expression of any intention to further hold eighty per cent of the property and is conclusive in its direction to return eighty per cent. It is more that appropriate, therefore, that we inquire into the circumstances which begot the Act and the intent of Congress in enacting it.

In the first place we find that the Settlement of War Claims Act was the result of an agreement between the German owners, the American claimants and the United States by which the American claimants and German owners each gave up temporarily a part of their rights.

The Treasury had, since 1925, insisted that the institution of private property and the protection of American private property abroad, not to speak of the definite commitments of the United States, made it essential that the

sequestrated private property be returned in full to its owners. (See Document No. 191, 69th Congress, 2nd Session.)

An Administration bill to this effect was introduced in 1926. The American claimants against Germany, however, felt that if the property were returned in full there would be insufficient funds with which to pay any considerable percentage of their claims. They therefore opposed immediate return in full, and advocated a compromise. The American claimants agreed among themselves that the owners of claims under $100,000 should be paid in full, whereas the balance of the large claimants would accept $100,000 plus a sum sufficient to make up 80% of their awards. For the balance, drawing interest at 5%, the American claimants were willing to wait.

Mr. Sidley, speaking for the American claimants, testified before the Senate Committee. See Hearings before the Committee on Finance, Jan. 23, 1928, United States Senate, 70th Congress, 1st Session (H. R. 7201) as follows (p. 22):

> "I am here to explain why it is that we would not want to go in and ask for a larger award for the German property. There has been a suggestion of 40 per cent instead of 20 per cent. Some people have asked why we do not come in and insist that there be 40 instead of 20, because obviously we would be benefited by it. Our answer to that is that under the insistence of the committee of the House and in view generally of the situation which existed, it became necessary for us to enter into an understanding with the German interests in order to get some kind of a bill through. The vital thing to us is to get a bill. The most unhappy thing would be a deferment of the bill beyond this session. It was

said to us by the Committee on Ways and Means that, 'You and these Germans try to get together on some compromise and see if you can not get a basis upon which we can act,' and it was suggested by Mr. Green at the time that, 'Possibly if you could get 75 per cent of your claims now and the Germans 75 per cent of the property, and defer the balance, that might be a basis.'

"Consequently, we had a meeting of our committee and conferred with our people as far as we could and concluded that we could make some substantial concessions in order to get some kind of a bill through. We met the Germans, Doctor Kiesselbach and Doctor von Lewinsky, and they assured us they did represent substantially all of the interests which had to do with the alien property fund and that they also spoke for the shipowners, and they were prepared to make very substantial concessions; not what we would like—the bill is not what we wanted to begin with—but they offered this 20 per cent retention of the alien-property fund. They offered to throw in all of the unallocated interest. They offered this 50 per cent of the ship money, which looked like a considerable concession, and we concluded upon that basis we would report to Mr. Green that we would support the bill on that basis."

This agreement is to be found in the Hearings before the Committee on Finance, Jan. 8, 1927, 69th Congress, 2nd Session (p. 129) and reads as follows:

"December 1, 1926.

"Hon. William R. Green,
Chairman Ways and Means Committee,
House of Representatives.

Dear Mr. Green: For your information and that of your committee in drafting proposed legislation, we note the following as a general basis of agree-

ment between the American and German interests which we respectfully represent:

1. Twenty per cent of the alien property fund to be temporarily retained and so invested in Dawes plan annuities as to become applicable to the immediate payment of American claims, the balance of the 80 per cent of the alien property fund to be promptly returned to the owners.

2. Fifty per cent of awards for payment of German ships, radio stations, patents, etc., to be likewise temporarily retained and applied to American claims as soon as it becomes available, and the balance of such awards distributed to ship owners, et al.

3. The $26,000,000, approximately, of unallocated interest in the hands of the Treasury to be similarly applied to American claims.

4. The $14,000,000, approximately, of Dawes plan payments received up to September, 1927, to be applied to the payment of American claims.

5. All funds in the hands of the Alien Property Custodian formerly belonging to the German Government, together with all funds so held the ownership of which is not disclosed within a period to be fixed in the bill, and thereafter established to be applied to the payment of American claims.

6. To the extent that the above payments on the American claims fall short of 80 per cent of the total amount of such claims, including interest thereon as awarded to January 1, 1927, the receipts from the Dawes plan payments accruing subsequent to September, 1927, to be first applied to payment thereof until such 80 per cent has been paid in full, and thereafter said receipts from the Dawes plan

payments to be distributed ratably among the remaining unpaid claims of Americans, alien property claimants, and ship, radio, and patent claimants, together with 3½ per cent interest thereon, until they are paid in full; and thereafter these Dawes plan payments to be applied as they accrue to the payment of the $26,000,000 of unallocated interest advances as aforesaid, together with 3½ per cent interest thereon until paid, thereafter the Dawes plan payments to be applied to the payment of the United States Government awards against Germany.

WILLIAM P. SIDLEY,
For the American Claimants.

W. KIESSELBACH,
For the German Claimants."

The Committee on Finance of the Senate reported (S. Rep. 273—70th Congress—1st Session, p. 4) this agreement as follows:

"Under the terms of the bill an amount equal to 80 per cent of the aggregate of the awards entered by the Mixed Claims Commission, entered on account of claims of nationals of the United States, is to be used immediately for the payment of all death and personal injury claims awards and all awards of $100,000 or less. The balance is to be prorated among the larger awards. The above percentage was reached by an agreement between the representatives of the American claimants affected and of the German alien property owners. The representatives of the American claimants appeared before your Committee and testified that the percentage was very satisfactory and that they preferred that the provisions of the bill be in accordance with the agreement. Consequently, your Committee is recommending no change."

Thus, does it appear that all parties concerned were agreeable to the plan and that the proposed provisions were suitable provisions for the payment of the American claimants.

The Report of the Committee on Finance of the Senate (S. Rep. 273—70th Congress—1st Session) is unusually complete and detailed.

The report states that the Mixed Claims Commission had been set up and awards had been made and that Germany had undertaken to pay the awards. It then states at p. 2:

> "But if the American claimants are forced to rely upon the distributive share in the payments by Germany, approximately 61 years will be required for payment in full. *Consequently, some method must be provided by which the American claimants can obtain a more immediate payment.*"

A "method" which would have provided for "a more immediate payment" would have been the sale and disposition of the alien property. However, Congress proposed no such "method".

The report then states at p. 2 that:

> "Under the Knox-Porter peace resolution, which was incorporated in the Treaty of Berlin, the United States unquestionably possesses the right to retain this property until Germany has made suitable provision for the satisfaction of the claims of American nationals against the German Government."

but the report states at p. 2:

> "Unless, however, Congress is prepared to adopt a policy of confiscating the property of an enemy national to pay the debts of his government some provision must be made for a more immediate return of this property."

Taking up the provisions of the Bill for the immediate return of eighty per cent of the property, the Committee reported that the whole policy of Congress had been not to confiscate and to ultimately return the property to the owners thereof. They reported (Report 273, 70th Congress, 1st Session, p. 12):

> "The text of the trading with the enemy act as originally enacted, the reports of the committees accompanying the bill, the discussion on the floor of both Houses of Congress, and numerous court decisions under the original act, clearly indicate that the act contemplated sequestration rather than confiscation. The amendment of March 28, 1918, however, broadened the powers of the Alien Property Custodian so as to include the right to manage or sell the property 'as though he were the absolute owner,' and in the so-called Chemical Foundation case decided by the Supreme Court on October 11, 1926, the Supreme Court held that when any of the property was sold the former enemy owners were deprived of all rights in the property and in the proceeds derived from the sale. Though it was unnecessary for the purposes of this particular decision, the language of the court is broad enough to be open to the construction that the seizure of property under the authority of the trading with the enemy act, as amended, together with the applicable treaty provisions, deprived the owner of all rights, whether or not the property was sold, and that the property was virtually confiscated.
>
> "It is to be noted, however, that even if the property should be held to have been confiscated (under the dictum of this decision), in spite of the clear intent of Congress to the contrary, Congress nevertheless has retained at all times absolute authority over this property and could at any time not only return it to the orginal owner but declare

it to be held for the benefit of and for ultimate return to the original owner. This is apparently just what Congress did under the terms of the Winslow Act in providing that $10,000 of the principal shall be returned to each individual owner, and that thereafter the earnings or interest on the property remaining in the hands of the Alien Property Custodian shall be paid to the owner annually up to the sum of $10,000. So that notwithstanding the undoubted power of Congress to confiscate, reaffirmed in the Chemical Foundation case, Congress not only has refused to exercise that power up to the present time but has clearly by legislation asserted its policy to be the very contrary of confiscation.

"It is fair to say that the primary reason for not returning all the alien property at the time of the adoption of the Winslow Act was that Congress was under a duty to retain sufficient property as security until the German Government should make adequate provision for the settlement of the claims of American nationals against Germany and its nationals."

Then the Committee took up the provisions of the Treaty of Berlin as follows:

"The treaty provisions governing the disposition of the alien property are to be found in Section IV of Part X of the treaty of Versailles (article 297 et seq.), the rights under which are specifically reserved to the United States under the preamble and Article II of the treaty of Berlin. Under these provisions, the allied and associated powers reserved the right to liquidate the property of German nationals that had come into their hands, and to apply the proceeds to the settlement of claims of their own nationals against Germany based upon the economic clauses (Part X) of the treaty, and

to retain any property or the proceeds thereof not so used, and provided that any property or the proceeds thereof not used for the settlement of the claims of their own nationals should be credited to Germany on her reparation obligations. Germany at the same time undertook 'to compensate her nationals in respect to the sale or retention of their property, rights or interests in Allied or Associated States.'

"The preamble to the treaty of Berlin includes in full the provisions of sections 1, 2 and 5 of the joint resolution of Congress approved July 2, 1921, section 5 of which provides that all property of German nationals held by the United States Government 'shall be retained by the United States of America and no disposition thereof made, except as shall have been heretofore or specifically hereafter shall be provided by law until such time as the Imperial German Government * * * or successors, shall have * * * made suitable provision for the satisfaction of all claims against said Government.' Article II of this treaty provides that the rights and advantages stipulated in Part X of the treaty of Versailles shall be enjoyed by the United States, but that 'in availing itself of the rights and advantages stipulated' in the treaty of Versailles the United States 'will do so in a manner consistent with the rights accorded to Germany under such provisions.'

"It is apparent that the language of the preamble to the treaty of Berlin under which the United States reserves the right to retain the property until suitable provision has been made for the settlement of American claims is inconsistent with its rights under Article II of the treaty which, by reference to Part X of the treaty of Versailles, specifically gives the United States the right to liquidate the property and to apply the proceeds to payment of claims of American nationals against the German Government."

And the Committee concluded as to the treaties:

> "The only interpretation which will reconcile these provisions is that the United States specifically reserved the right to use the German property for the settlement of American claims *only if suitable provision were not made by the German Government for the settlement of American Claims.* And Congress has reserved to itself the decision of this question." (Italics ours.)

Then after showing the provisions which had been made by Germany, the Committee explains the Act in detail, including the provision for the immediate return of eighty per cent. upon the agreement of the owner to the retention and use by the United States of the remaining twenty per cent. The clear intent, purpose and expression of the Committee was that the provisions which had been made for the payment of claims of American nationals were suitable and that, therefore, the obligation of the United States was to provide for the immediate return of so much of the property, to wit 80%, as was justified under the agreement which had been made.

(b) By the Settlement of War Claims Act of March 10, 1928, Congress definitely, finally, and conclusively carried out the policy of non-confiscation and definitely, finally and conclusively gave to the owners of the property a right to the immediate return of eighty per cent. of their property.

As hereinbefore stated the settlement was one which had the approval of the German owners and the American

claimants and the Committee in charge of the Bill not only called attention to such agreement but clearly advised that it was the intent and purpose of the Bill to carry the agreement into effect and that, in doing so, Congress was determining that the suitable provisions for the payment of American claims, which Germany was obliged to make under the Treaty of Berlin had been made and that, by the Bill, Congress was fulfilling the agreement of the United States, under the Treaty, to release the property.

The Act itself shows conclusively that such purpose was absolutely effected and that, by it, all dominion and control over eighty per cent. of the property was surrendered by Congress and that whatever right or title the United States had theretofore had therein was given up and again fully and completely vested in the owners.

(b-1) THE STATUTE AND RESPONDENT'S COMPLIANCE THEREWITH.

The Settlement of War Claims Act (45 Stat. 254), which is entitled—

> "An Act to provide for the settlement of certain claims of American nationals against Germany, Austria, and Hungary, and of nationals of Germany, Austria, and Hungary, against the United States, and for the ultimate return of all property held by the Alien Property Custodian.",

contains an amendment to Section 9 of the Trading with the Enemy Act.

Section 11 of the Settlement of War Claims Act provides that subsection (b) of Section 9 of the Trading with

the Enemy Act should be amended so that subsection (b), omitting immaterial parts, shall read as follows:

> "(b) In respect of all money or other property conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, if the President shall determine that the owner thereof at the time such money or other property was required to be so conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or at the time when it was voluntarily delivered to him or was seized by him was——
>
> * * *
>
> "(13) A partnership, association, or other unincorporated body of individuals, having its principal place of business at such time within any country other than Austria, Hungary, or Austria-Hungary, or a corporation organized or incorporated within any country other than Austria, Hungary, or Austria-Hungary, and that the written consent provided for in subsection (m)* has been filed.
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*NOTE: Subsection (m) of Sec. 9 referred to in paragraph (13) above, is a provision of the Trading with the Enemy Act as amended by the Settlement of War Claims Act, providing as follows, omitting the immaterial parts:

> "(m) No money or other property shall be returned under paragraph (12), (13), (14), or (16) of subsection (b) or under subsection (g) or (n) or (to the extent therein provided) under subsection (p), unless the person entitled thereto files a written consent to a postponement of the return of an amount equal to 20 per centum of the aggregate value of such money or other property (at the time, as nearly as may be, of the return), as determined by the Alien Property Custodian, and the investment of such amount in accordance with the provisions of section 25."

Section 25 provides for the investment out of the funds held by the Alien Property Custodian by the Treasurer of the United States in one or more participating certificates issued by the Secretary of the Treasury in accordance with the provisions of that section.

> "Then the President, *without any application being* made therefor, may order the payment, conveyance, transfer, assignment, or delivery of such money or other property held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine such person entitled, either to the said owner or to the person by whom said property was conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian; * * *." (Italics ours.)

These provisions are followed by subsection (c) of Section 9 of the Trading with the Enemy Act as amended by the Settlement of War Claims Act, which section reads as follows:

> "(c) Any person whose money or other property the President is authorized to return under the provisions of subsection (b) hereof may file notice of claim for the return of such money or other property, as provided in subsection (a) hereof, and thereafter may make application to the President for allowance of such claim and/or may institute suit in equity to recover such money or other property, as provided in said subsection, and with like effect. * * *"

Therefore subsection (c) authorizes former enemy owners to proceed under subsection (a) of Section 9 of the Trading with the Enemy Act, which theretofore had been confined to non-enemy claimants.

Subsection (a) of Section 9, omitting the immaterial parts, provides:

> "That any person not an enemy or ally of enemy claiming any interest, right, or title in any money

> or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder * * * may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, * * *. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required * * * said claimant may institute a suit in equity in the Supreme Court of the District of Columbia * * * to establish the interest, right, title * * * so claimed, and if so established *the court shall order the payment*, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States." (Italics ours.)

In other words we have a direction for the immediate return of the property, seized by the Custodian, to its German owners, providing they consent to the postponement of the return of an amount equal to 20% of the property.

In this case in paragraph 9 of the complaint (R. 2) it is alleged that the respondent has filed a notice of claim containing such particulars as required by law, which means that the respondent has filed a consent under subsection (m) of Section 9 of the Trading with the Enemy Act to the postponement of the return of an amount equal to 20% of the value of the property seized.

In other words, the *Court* is directed by this legislation to return the property if the President does not return it through the Custodian administratively. Thus the former enemy owner is entitled to receive from the court, when his action is brought, a direction for the immediate return of his property provided he files the consent to the postponement of the return of the 20%.

It follows from the above that the respondent herein was, on March 10, 1928, entitled to the return of 80% of the property formerly belonging to it and seized by the United States Government.

Being entitled to such immediate return the question arises—How can Congress, having directed such immediate return, 95% having already been returned, deprive the respondent, part owner of the remaining 5%, of that which it has thus recognized as respondent's property? (See Reports of Alien Property Custodian, H. R. Doc. 543, 1930 and H. R. Doc. 133, 1933.)

After March 10, 1928 the Alien Property Custodian no longer held the property, for the return of which this suit is brought, for the United States but for the exclusive benefit of the respondent. The capacity of the Alien Property Custodian was definitely changed by the Settlement of War Claims Act of 1928.

Upon the enactment of the Settlement of War Claims Act the owners of the property seized were given the right to the immediate possession of their property upon submitting proper proof of ownership and consent to the temporary withholding of 20% thereof. From their property the Alien Property Custodian was authorized to withhold only 20% (temporarily), taxes and the amount of "necessary expenses".

In the complaint it is alleged (Par. 10) (R. 2) that prior to the commencement of the action the Alien Property Custodian determined that the respondent herein was the owner of said property and entitled to the return of said property as provided by the Trading with the Enemy Act as amended by the Settlement of War Claims Act.

It is clear, therefore, that respondent having complied with all the provisions of the Act, was, under the Act, entitled to the immediate return of eighty per cent. of its property.

(b-2) THE VARIOUS PROVISIONS OF THE SETTLEMENT OF WAR CLAIMS ACT INDICATE THAT THE UNITED STATES GOVERNMENT INTENDED TO PART WITH EVERY AND ALL INTEREST IN THE SEIZED PROPERTY EXCEPT THE 20% "TEMPORARILY" WITHHELD AND THE AMOUNT RESERVED FOR EXPENSES.

Numerous provisions of the Trading with the Enemy Act as amended by the Settlement of War Claims Act, indicate that Congress intended to surrender all of the rights of the United States Government in and to the property seized.

Thus by Section 25 (e), added to the Trading with the Enemy Act by Section 10 of the Settlement of War Claims Act, the Secretary of the Treasury was directed to issue to the Custodian 5% interest bearing certificates representing such 20% deductions, and also non-interest bearing certificates representing the claimants' interest in the so-called unallocated interest fund, which included accumulated interest derived prior to March 4, 1923 from invested cash of former enemies, the repayment of which was postponed. (See Sec. 28 of the Settlement of War Claims Act.)

Section 25 (e) subdivision (2) contains the following provisions with regard to these participating certificates:

> "(2) Such certificates shall not be transferable, except that the Alien Property Custodian may transfer any such participating certificate evidencing the interest of a substantial number of the *owners* of the money invested, to a trustee duly appointed by such *owners*." (Italics ours.)

The evident purpose of this provision was that the owners could obtain from some bank or bankers or other persons, advances upon the security of these certificates. This is the strongest evidence that Congress intended to divest the United States Government completely of any interest in the property, not only that returnable outright, but even that "temporarily" withheld. It must be remembered that the fund of some $35,000,000 representing the 20% "temporarily" withheld from its recognized owners, was paid into the Special Deposit Account for distribution to the American claimants, so that this money was not actually retained by the United States. The expression "temporarily" withheld appears also in Section 25.

Section 25 (a) subdivision (2) contains the following sentence:

> "(2) When in the case of any trust written consent under subsection (m) of section 9 has been filed, an amount equal to the portion of such trust the return of which is temporarily postponed under such subsection shall be credited against the investment made under paragraph (1) of this subsection."

Thus, the retention of 20% was only a "temporary" matter, whereas the balance of 80% was to be returned immediately.

By Section 9 (m), added to the Trading with the Enemy Act by Section 14 of the Settlement of War Claims Act, it is provided that claimants of designated classes before receiving their property must "consent to a postponement of the return of an amount equal to 20 per centum of the aggregate value thereof". Therefore the "amounts so deducted shall be returned to the persons *entitled thereto* as provided in subsection (f) of section 25."

By Section 30, added to the Trading with the Enemy Act by Section 15 of the Settlement of War Claims Act, it is provided that any property returnable under subsection (b) or (n) of section 9 of the Trading with the Enemy Act, which includes property of former enemy owners, shall be subject to attachment on suits brought against the owners.

If, therefore, the 80 per cent. was attachable by third parties, there can be no doubt that it was property *vested* in the Germans. For, if the United States had reserved even the faintest rights thereto, it could not have been attached as property of the Germans.

By Section 24 (b), added to the Trading with the Enemy Act by Section 18 of the Settlement of War Claims Act, it is provided that income, war-profits, excess-profits, or estate taxes imposed by any Act of Congress, shall be computed as if the property had not been seized by the Custodian but had been held at all times by the alien owners themselves.

Other provisions of the Settlement of War Claims Act, aside from its title, show numerous provisions consistent only with the revesting of title in the original owner. Among these are:

Authorization to the Custodian to withdraw outstanding demands for enemy property upon receiv-

ing 20% thereof (Sections 29 (a), 29 (b)), thus relinquishing *even the seizure* of the 80%.

References to the former enemy as the person *"entitled"* thereto or *"owners"* (subdivisions m and p of Section 9; Section 25 (e), subdivision 2; Section 26 (b), subsections (d), (g), (j) of Section 9).

That the enemy may receive its entire property if, to avoid a sale thereof, he pays 20% to the Custodian (subsection m. of Section 9). *To permit him to pay 20% without giving him the property would constitute a positive fraud by the United States.*

Even the full income from March 4, 1923 was directed to be paid the former enemy out of property "held in trust for such person" (Section 23), as well as his proportion of the unallocated Treasury interest (Sections 26 a, b, c).

These provisions are a clear demonstration that Congress recognized the rights of the aliens as owners of the property, and that they were to be vested, upon the passage of the Act, with complete owners' interest in the property returned.

Petitioners contend that because, as held by this Court in the case of *Woodson* v. *Deutsche G. und S. Scheideanstalt,* 292 U. S. 449, there was in the original Trading with the Enemy Act and amendments thereto a reservation to tax expenses incurred by the Custodian in administering the property while in his possession, Congress must therefore have reserved unto itself the right to enact Public Resolution 53.

In that case this Court recognized that Congress intended to make these reservations for the payment of expenses, because there had been an express reservation in the original Trading with the Enemy Act, and amendments thereto, and therefore held that as to the 2% retained for the expenses there was no vested right infringed. On this subject this Court said as follows (p. 454):

> "The original act, coupled with the later Acts of March 4, 1923, and May 16, 1928, plainly discloses a reservation to Congress of power to appropriate the property seized or its proceeds, *as far as might be deemed necessary, to the payment of expenses incurred in the seizure and subsequent administration.* The funds here in question are proceeds which were deducted for that purpose *when payments were made from time to time to the enemy owner.* As respects property or proceeds so retained by the Custodian there is no room to doubt that Congress had full power to cause it to be applied to the payment of such expenses. And, of course, Congress had ample power to ratify deductions made by the Custodian to cover such expenses. This is in effect what was done by the Act of March 28, 1934. True, it forbade the commencement or maintenance of a suit to recover funds so deducted, but this merely reflects and emphasizes the purpose to sanction and ratify the deductions by the Custodian, and in such circumstances does not deprive the respondent of any *vested* interest." (Italics ours.)

The necessary inference, from the fact that this Court held that because of the original reservation in the Trading with the Enemy Act, and in the Acts of March 4, 1923 and May 16, 1928 there had been these reservations, is that

the owners were entitled to the return of the balance of the property not thus reserved for expenses, and therefore, as to the balance these owners must have a vested interest.

It is only with respect to the reservations made by Congress that this Court held there was no vested interest. As to the balance this Court's opinion implies that the owners have a vested interest. This confirms the conclusion which the legislative history of the transaction amply demonstrates.

(b-3) THE DEBT-FUNDING AGREEMENT OF 1930 EMPHASIZES THE INTENT OF CONGRESS TO REVEST IN THE OWNERS FULL AND ABSOLUTE TITLE IN THE PROPERTY BY THE SETTLEMENT OF WAR CLAIMS ACT OF 1928.

We have hereinbefore (*supra*, pp. 18-21) pointed out that by the Debt-Funding Agreement of 1930, the United States agreed to accept the full faith and credit of Germany "as the only security and guaranty" for the payment of Germany's war obligations to the United States; that it accepted the bonds of Germany as the evidence of such payment; that it still holds, and has not surrendered, such bonds; and that it agreed to the release of all property which Congress had directed to be released by the Settlement of War Claims Act of 1928.

We there pointed out and we here again emphasize that that Agreement and the terms thereof forces the inescapable conclusion that Congress, by the Settlement of War Claims Act intended to provide and did provide for the divesting of every possible interest of the United States in the property returnable thereunder and that it intended to and did

provide for the removal of every possible cloud upon the title of the owners therein.

(c) The Settlement of War Claims Act vested in the former owners an immediate right to the return of their property and the owner having complied with the provisions of the Act, cannot be deprived of his vested right therein.

We have hereinbefore pointed out that it was the intention of Congress that the German owners should obtain the immediate return of their property, subject only to the deductions for expenses, taxes and the 20% "temporarily" withheld.

The Government now contends that this return was an act of grace similar to the grant of bonuses and pensions.

(c-1) RESPONDENT'S INTEREST IN ITS PROPERTY WAS NOT COMPLETELY AND IRREVOCABLY DESTROYED.

Since, as we have shown hereinbefore, the property was not and was not intended to be confiscated and since the entire purpose and intent of this Government has been to merely hold the property or its proceeds for ultimate return to the owners thereof, it is, we submit, entirely erroneous to interpret the decisions of this and other courts to mean that the title to and control of the property gained by the United States completely and irrevocably destroyed every possible interest of the owners therein. Decisions are to be read in the light of the facts and circumstances under which they are made. Cases in which the control of Congress has been attacked and in which nothing had intervened to show a relaxation or modification of such control are, we submit, to be distinguished from a case

where something has intervened to establish an interest theretofore unenforceable.

This Court and other courts have, it is true, stated in varying language the paramount control of Congress over alien property and, in doing so, they have stressed such control to the exclusion of the owner. But it is apparent that the cases wherein the statement appears were entirely different from a case, such as this, where a vested interest has been obtained in the property. The cases cited by petitioners are clearly not in point. Thus, in the case of *Klein* v. *Palmer,* 18 F. (2d) 932, the owners sought to set aside a sale of property made by the Alien Property Custodian. In the case of *Crone* v. *Sutherland,* 63 F. (2d) 895, the plaintiff challenged the right of the Custodian to deduct 2% from her claim for expense of administration. In the case of *Commercial Trust Co.* v. *Miller,* 262 U. S. 51, a trustee sought to have the rights to property adjudicated before possession could be asserted by the Alien Property Custodian. In the case of *United States* v. *Chemical Foundation,* 272 U. S. 1, the suit was to set aside a sale of patents made by the Alien Property Custodian. In the case of *Woodson* v. *Deutsche, etc. Vormals,* 292 U. S. 449, plaintiff sought to recover 2% expenses which had been deducted by the Alien Property Custodian, notwithstanding a statute which prohibited recovery of such deductions.

Is it not clear that the principle here involved is in no way analogous to the questions involved in those cases? No doubt the enemy owners could not question the right of Congress to confiscate the property had it so willed. Nor could they question the right of Congress to sell the property or to deduct 2% therefrom for expenses or to seize the property without previous adjudication of ownership.

They could not, because the United States had complete control over the property to the exclusion (until Congress acted) of the power of the owners of the property judicially to assert and vindicate their rights therein.

But such cases are far different from a case where Congress, in the exercise of its complete control has determined that the purpose for which the property is held no longer exists and ordains the return of the property to the owners under conditions with which the owners complied. In other words, the ownership was never denied by Congress but could not be asserted without the permission of Congress. Only control, not interest of the owners, was for the time being divested. But such control was as clearly revived by the Settlement of War Claims Act.

The distinction was recognized in the case of *Commissioner of Internal Revenue* v. *Stearns*, 65 F. (2d) 371, in which certiorari was denied by this Court October 16, 1933 (290 U. S. 670). The decision there reached could not possibly have been made without the recognition of an interest in the property by the owner. The Court stated (p. 374):

> "Apparently seizure changed 'title'; it was the substitute for the voluntary act by which the property might be 'conveyed, transferred, assigned, delivered, or paid'. * * * . The custodian had the powers of a 'common-law trustee' * * *, which cannot without undue strain be supposed to go without the legal title on which such powers ordinarily depend".

and then the Court stated (p. 374):

> "*But even though we grant so much, the beneficial interest need not pass,* and section 12 itself shows that there was no purpose at the time that it

> should; for it was enacted that all enemy claims to 'property received and held * * * shall be settled as Congress shall direct'. No doubt the power to confiscate was held in reserve, but it was not exercised and might never be. In fact it never was, except in small part. That this was the general intent, the reports of the two Houses amply disclose * * *. The contrary would have violated international usage of at least one hundred years". (Italics ours.)

As was stated by the Court below (R. 24-25):

> "At the risk of unnecessary repetition, we repeat what we have already said, namely, that we fully recognize that the war powers of the United States gave them the right to confiscate the property of an enemy found in this country; but we assert, as equally true, that there can be no confiscation of enemy property, in the sense that title is changed and the rights of the original owner destroyed, without an Act of Congress to that effect. The declaration of war is not such an act. It has never been held that a state of war operated of itself and by its own force to accomplish a transfer of the title of property. *Brown* v. *The United States*, 8 Cranch, 110."

(c-2) THE SETTLEMENT OF WAR CLAIMS ACT WAS AN ACT UNDER WHICH RESPONDENT COULD AND DID OBTAIN A VESTED INTEREST IN ITS PROPERTY.

Petitioners contend that the return provided for in the Settlement of War Claims Act was such as to make applicable here the principle laid down in cases involving gratuities, pensions, etc., that such are not protected by the Fifth Amendment to the Constitution.

That one cannot obtain a vested interest, protected by the Fifth Amendment to the Constitution, in a pension or a gratuity is a principle too well settled to permit of debate. But, that the return of property under the Settlement of War Claims Act is not in any way analogous to a pension or gratuity as governed by the principle is equally clear.

Petitioners cite the cases upon which they rely and we submit that an analysis of them does not even remotely sustain their conclusion that this is a case in which the principle applies.

The cases of *United States* v. *Teller*, 107 U. S. 64 and *Frisbie* v. *United States*, 157 U. S. 160, each involved pensions and in each of them this Court held, as stated in the *Teller* case (p. 68):

> "No pensioner has a vested legal right to his pension. Pensions are the bounties of the government, which Congress has the right to give, withhold, distribute, or recall, at its discretion".

In the case of *United States* v. *Cook*, 257 U. S. 523, this Court said (p. 527) that cases in which pensions are involved:

> "* * * merely establish that Congress in shaping the form of its bounty may impose conditions and limitations on its acquisition and enjoyment by the beneficiaries which it could not impose on the use and enjoyment by them of a vested right".

In re Hoag, 227 Fed. 478, and *In re Goodwin*, 57 F. (2d), 31, each involved pensions to which the courts held there could be no vested right. And *Field* v. *Giegengack*, 73 F. (2d) 945, involved a right to leave of absence by a

Government employee and the Court held that such leave is a privilege in which there could not be a vested right:

It is at once apparent that such cases cannot have any application here. There the claimants were the recipients of the bounty of the United States; no property of theirs was involved; what they were receiving was not their own property which the United States had seized or received, but was the property of the United States, derived from the revenues of the United States and gratuitously given to them by the United States. Here we are dealing with property belonging to this respondent, which was sequestered as a war measure, which was never intended to be and never was confiscated by the United States, which was held and administered as trust property belonging to respondent, against which claims of the respondent could eventually be pressed, and as to which Congress eventually by the Settlement of War Claims Act carried into effect its consistent determination to return to respondent. Obviously, there is a wide difference between a pension or gratuity of the United States, paid out of the revenues of the United States, and gratuitously given therefrom by the United States and a return of property to an owner from whom it was seized, for whom it has been held and administered, and which never was a revenue or became a part of the funds or property of the United States.

Petitioners say (Brief pp. 32-33) that "it was an act of grace for Congress in the early amendments to the Trading with the Enemy Act and in the Settlement of War Claims Act of 1928, to authorize a partial return of the property" and they cite the cases which they say sustain the point. It should be noted that we are here concerned with rights which respondent obtained under the Settlement of War

Claims Act of 1928; there is no question here involved as to its rights under previous statutes. Neither in the case of *Kogler* v. *Miller*, 288 Fed. 806, which was decided on May 2, 1923, nor in the case of *U. S.* v. *White Dental Co.*, 274 U. S. 398, which was decided on May 16, 1927, was there nor could there have been involved any rights under the Settlement of War Claims Act of 1928.

The case of *Chemische Fabrik von Heyden* v. *Tait*, 64 F. (2d) 295, was to recover income and excess profits taxes deducted and paid from enemy property. Both the lower court (58 F. (2d) 814) and the Court of Appeals (64 F. (2d) 295) pointed out that the taxes were properly deductible under Section 18 of the Settlement of War Claims Act (Subsections b and c of Section 24 of Trading with the Enemy Act, 50 U. S. C. A. Appendix). The Court said (64 F. (2d) 296) in quoting the Court below:

> "In the view I take of the matter the dominant and controlling consideration is that the 'Settlement of War Claims Act' was an act of grace of the sovereign United States, and in returning the property this Government undoubtedly had the clear right to impose such terms and conditions as it pleased Congress to enact."

In the case of *Krausz* v. *United States*, 14 F. Supp. 291, decided by the Court of Claims, there was involved the question of the assessment and collection of taxes on enemy property. The Court stated that until the law made provision for the return, the owners had no enforceable rights in the property and then stated (p. 294):

> "Whatever rights the former owners subsequently obtained were through and under the War

> Claims statute which was purely an act of grace on the part of our government."

and that:

> "We have already shown that *until the War Claims Act became a law* the former owners of the property seized had no enforceable rights whatever therein, and when the act was passed they acquired no rights *except those granted thereby*". (Italics ours.)

and the Court held that under the express provisions of the Settlement Act, the taxes were assessable and collectible. It is to be noted, however, that, while the Court describes the statute as "an act of grace", it recognizes and holds that, under it, the owners gained enforceable rights in the property as granted by the statute.

In neither of these cases of *Chemische Fabrik von Heyden* v. *Tait, supra,* or *Krausz* v. *United States, supra,* is there the slightest reference to the provisions of Section 5 of the Knox-Porter Peace Resolution of July 2, 1921 nor the Treaty of Berlin of August 25, 1921, in which said Section 5 is incorporated. In view of the fact that the United States solemnly agreed in the Treaty of Berlin to release the property when Germany made "suitable provision" for the satisfaction of American claims and in view of the fact that the Settlement of War Claims Act was the result of such "suitable provision", it seems clear that, had the Courts had before them such provision of the Peace Resolution and the Treaty, they would not have used the words "purely an act of grace" and thereby import no obligation whatever upon the part of the United States. And, indeed, the Court of Claims in the *Krausz* case specifically states

that the owners had "enforceable rights" when "the War Claims Act became a law", language which, we submit, imports much more than "an act of grace".

But neither of the cases affords the slightest basis for the conclusion that a vested interest could not be obtained in the property by an owner who complied with the conditions of the Act. On the contrary, the decisions recognize the right under the conditions of the Act. In neither of them is there the slightest intimation that the rights which a claimant obtained under the Act were determinable on principles applicable to pensions and gratuities. The Settlement of War Claims Act was an act dealing with property of friendly aliens and not with property of the United States derived from the revenues of the United States. Certainly the rights of owners who have complied with the terms of the Act rest on much firmer ground than do acts for pensions and gratuities and certainly, too, should those affected thereby have the protection of the Constitution against the deprivation of their own property without due process of law.

(c-3) THE RETURN OF THIS PROPERTY IS CONGRESSIONAL RECOGNITION OF AN ABSOLUTE LEGAL AND MORAL RIGHT BASED UPON INTERNATIONAL LAW.

The contention of the petitioners that this return was an act of grace similar to the grant of bonuses and pensions, leaves out of sight the fact that the basis of the return of this property is Congressional recognition of an absolute legal and moral right based upon international law.

Our greatest authority on International Law, John Bassett Moore, in his Digest of International Law (Vol.

VII, 312-313), stated, in discussing Chief Justice Marshall's professed distinction between a right and the exercise of a right:

> "Referring to the practice of nations and the writings of publicists, he declared that, according to the 'modern rule tangible property belonging to an enemy and found in the country at the commencement of war, ought not to be immediately confiscated'; that 'this rule' seemed to be 'totally incompatible with the idea that war does of itself vest the property in the belligerent government'; and consequently, that the declaration of war did not authorize the confiscation. Since effect was thus given to the modern usage of nations, it was unnecessary to declare, as he did in the course of his opinion, that 'war gives to the sovereign full right to take the persons and confiscate the property of the enemy, wherever found,' and that the 'mitigations of this rigid rule which the humane and wise policy of modern times has introduced into practice' though they 'will more or less affect the exercise of this right,' 'can not impair the right itself.' Nor were the two declarations quite consistent. *The supposition that usage may render unlawful the exercise of a right, but can not impair the right itself, is at variance with sound theory.* Between the effect of usage on rights, and on the exercise of rights, the law draws no precise distinction. A right derived from custom acquires no immutability or immunity from the fact that the practices out of which it grew were ancient and barbarous. We may, therefore, ascribe the dictum in question to the influence of preconceptions, and turn for the true theory of the law to an opinion of the same great judge, delivered twenty years later, in which *he denied the right of the conqueror to confiscate private property.*

> on the ground that it would violate 'the modern usage of nations *which has become law.*' (*United States* v. *Percheman*, 7 Peters, 51.)" (Italics ours.)

Furthermore, we have indicated that all this property remained here, after President Wilson, on February 8, 1917, promised that it would not be confiscated. We have before us in the Settlement of War Claims Act, legislation carrying out this promise made by President Wilson and we have the Debt-Funding Agreement of 1930 in which this country agreed to look to Germany and not to alien property for the satisfaction of Germany's war obligations to the United States. Therefore, the return of the property is not a mere act of grace but the carrying out of a solemn promise made pursuant to international law and United States policy.

If the return of the property is not a mere act of grace, then the return of such property must be regarded as vesting in the owner an immediate right of enjoyment.

That the satisfaction of a claim, having its foundation in international law, is not a mere act of grace, was indicated in the case of *Williams* v. *Heard*, 140 U. S. 529, 11 S. Ct. 885. In that case this Court held that the Act of Congress of June 5, 1882, providing for the distribution of the unappropriated moneys from the Geneva award for the payment of claims caused by the infraction of international law by the English Government due to the Alabama incident, and directing the examination of the claims and the payment of premuims for war risks, was not a mere donation but the effectuation of the payment of claims which existed before the passage of the Act of Congress.

In that case the Court held that the right to receive this payment provided for by Congress was a vested property right passing to the estate in bankruptcy of the claimant.

This Court, in *Williams* v. *Heard, supra,* adopting the ruling in the cases of *Comegys* v. *Vasse,* 1 Peters, 193, and *Phelps* v. *McDonald,* 99 U. S. 298, and adopting the language of Mr. Justice Swayne in the case of *Phelps* v. *McDonald, supra,* said at 544:

> " 'There is no element of a donation in the payment ultimately made in such cases. Nations no more than individuals make gifts of money to foreign strangers. Nor is it material that the claim cannot be enforced by a suit under municipal law which authorizes such a proceeding. In most instances the payment of the simplest debt of the sovereign depends wholly upon his will and pleasure. The theory of the rule is that the government is always ready and willing to pay promptly whatever is due to the creditor. * * * It is enough that the right exists when the transfer is made, no matter how remote or uncertain the time of payment. The latter does not affect the former. * * * If the thing be assigned, the right to collect the proceeds adheres to it, and travels with it withersoever the property may go. They are inseparable. Vested rights *ad rem* and *in re*—possibilities coupled with an interest on claims growing out of property—pass to the assignee.' 99 U. S. 303, 304. To the same effect are *Erwin* v. *U. S.,* 97 U. S. 392; *Bachman* v. *Lawson,* 109 U. S. 659, 3 Sup. Ct. Rep. 479."

Thus, it may be regarded as firmly established that the payment of these claims, and similarly the return of the property herein, cannot be regarded just as a mere act of grace of a sovereign.

The property of the German owners remained here by reason of the promise of the sovereign, and under the circumstances, the fulfillment of the promise not to confiscate but to return it must be regarded not as an act of grace but the performance of a clear moral duty. When this promise is carried out it cannot be regarded as a promise with, so to speak, strings attached to it. Consequently, the Act of Congress, embodied in the Settlement of War Claims Act, must be regarded as creating a vested right.

The recognition of a moral duty has from time immemorial been regarded as sufficient consideration for a promise based upon such moral duty without further payment of consideration.

Thus, a debt that has been discharged in bankruptcy, when afterwards recognized by a written promise to pay, becomes a new obligation without further consideration. This Court in *Zavelo* v. *Reeves*, 227 U. S. 625, said at page 629:

> "It is settled, however, that a discharge while releasing the bankrupt from legal liability to pay a debt that was provable in the bankruptcy, leaves him under a moral obligation that is sufficient to support a new promise to pay the debt."

(c-4) THE CASES OF *United States* v. *Cook*, 257 U. S. 523, AND *United States* v. *Realty Co.*, 163 U. S. 427, ASSERT A PRINCIPLE WHICH MAY BE APPLIED HERE.

The Court below has forcefully pointed out in its discussion of the cases of *United States* v. *Realty Co.*, 163 U. S. 427 and *United States* v. *Cook*, 257 U. S. 523, the distinction which exists between cases involving pensions

and gratuities and cases where there are claims of "an equitable, moral, or honorary nature". (See R. 15-18).

And we emphasize what the Court stated (R. 18):

> "* * * It cannot, we think, be contended that the seizure of itself and without more transferred ownership and destroyed title. The seizure, of course, transferred control, and the rights of the owner were in abeyance until Congress elected either to confiscate or to return. But having exercised the option, having renounced the power to hold the property, having declared the terms on which it would restore possession, and those terms being complied with by the former owner, we think it must be decided that its war power is exhausted. Certainly this is true of the property actually delivered, and, if true as to that, it seems to us in principle it is also true as to that which was withheld subject only to the condition that the title as against an adverse claimant should be established. In both cases the United States unqualifiedly renounced the exercise of its war power of confiscation and re-established title in the former owner, and it is too late now to have recourse to that power to take back rights which it has by formal act restored."

(d) The Settlement of War Claims Act conferred upon respondent the statutory right to the immediate return of eighty per cent. of its property and respondent, having consented to the acceptance of eighty per cent. thereof and to the retention of twenty per cent. thereof, obtained a vested right therein of which it cannot constitutionally be deprived by Public Resolution 53 of June 27, 1934.

We have hereinbefore pointed out that Section 12 of the Trading with the Enemy Act specifically provided

that "after the end of the war any claim of any enemy" to the property "shall be settled as Congress shall direct"; that "after the end of the war", by the Settlement of War Claims Act of March 10, 1928, Congress provided "for the ultimate return of all property held by the Alien Property Custodian"; that the Act provided for the immediate payment of eighty per cent. of the property and the "temporary" postponement of the payment of the remaining twenty per cent. thereof.

We also pointed out and here emphasize that this claimant is of the class described in subsection 13 of Section 11 of the Settlement of War Claims Act and that as such claimant it could not obtain the return of eighty per cent. of its property unless it filed "a written consent to a postponement of the return of an amount equal to twenty per centum of the aggregate value of such money or other property (at the time, as nearly as may be, of the return) as determined by the Alien Property Custodian, and the investment of such amount in accordance with the provisions of Section 25", as provided in subsection (m) of Section 14 of the Act. We also pointed out herein and alleged in the Bill of Complaint, the fact, which has not been and cannot be denied that respondent had complied with all the provisions of the Act, including the filing of such consent, long prior to the passage of Public Resolution 53 of June 27, 1934.

By the Act, Congress "directed" the return of eighty per cent. of its property to respondent and gave it full and complete statutory right to such return. Pursuant to that statutory right, respondent acted and performed every act, including that of filing a consent to the postponement of the payment of twenty per cent. of its property and of agreeing to accept but eighty per cent. thereof. *We submit*

that in such circumstances, the right of respondent to the return of eighty per cent. of the property was fixed by the law in force when it filed its consent to the postponement of the payment of twenty per cent. of its property and to the use of such twenty per cent. by the United States for the purposes set forth in the Act and the right so vested cannot be defeated by Public Resolution 53 of June 27, 1934.

When consideration is given to the fact that Congress at no time evidenced any purpose or intent, as to the ultimate disposition of the property other than to return it to its owners and that it always and consistently treated the property as belonging to the original owners thereof and that the purpose, intent, and action of Congress was, by the Settlement of War Claims Act, to immediately return 80 per cent. of the property to such owners, we think it follows that Congress, by such Act, absolutely surrendered all dominion and control over the same and could not by the subsequent Resolution again assume dominion and control over it.

But, assuming, *arguendo*, that such is not the law, *there certainly is no possible escape from the proposition that, when the statutory right was given and the parties had acted in compliance with and under authority of the statute, then and in that event respondent enjoyed a vested right which could not be defeated by the Resolution.*

In the case of *Steamship Company* v. *Joliffe*, 2 Wall. 450, according to a California statute, where a pilot licensed under statute had tendered his services to a vessel out of port and such services were refused, such pilot was entitled to half-pilotage fees allowed by statute in such cases. After tendering these services the statute was repealed, and it was claimed that by reason of this repeal the pilot was not

entitled to recover the half-pilotage fees, but Mr. Justice Field, writing the opinion of this Court, said (pp. 457-458):

> "* * * When a right has arisen upon a contract, or a transaction in the nature of a contract authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it, or an action for its enforcement. It has become a vested right which stands independent of the statute."

Certainly, there was and could have been no enforceable claim for mere tendered services, in the absence of statute, but under the statute a right to fees for such services was created. So also in this case, if it can be said that respondent had no enforceable claim for a return of the property prior to the Settlement Act, it certainly was given the right to the return of 80% thereof under the Act. In the *Joliffe* case, the pilot had tendered his services, for which tender he became entitled, under the statute, to the fees. So also in this case, respondent filed its claim and consented to the retention of 20% of the property and the use thereof by the United States, for which consent he became entitled, under the statute, to the immediate return of 80% of the property. In the *Joliffe* case, the Court held that by the tender of the services a right arose upon a contract and that that right was a vested right which could not be defeated by the repeal of the statute which provided for the fees. So also in this case, by giving the consent, a right arose upon a contract and that right is a vested right which cannot be defeated by Public Resolution 53.

In the case of *Ettor* v. *Tacoma*, 228 U. S. 148, the State of Washington had, by legislation, given to abutting owners

compensation for consequential damages growing out of an original street grading made under municipal direction. After the plaintiffs' damage had occurred a law was passed repealing such legislation. This Court said:

> "The necessary effect of the repealing act, as construed and applied by the court below, was to deprive the plaintiffs in error of any remedy to enforce the fixed liability of the city to make compensation. This was to deprive the plaintiffs in error of a right which had vested before the repealing act,—a right which was in every sense a property right. Nothing remained to be done to complete the plaintiffs' right to compensation except the ascertainment of the amount of damages to their property. The right of the plaintiffs in error was fixed by the law in force when their property was damaged for public purposes, and the right so vested, can not be defeated by subsequent legislation. *Elgin* v. *Eaton*, 83 Ill. 535; *Healy* v. *New Haven*, 49 Conn. 394; *Harrington* v. *Berkshire*, 22 Pick. 263; *People ex rel. Fountain* v. *Westchester County*, 4 Barb. 64, are cases arising under street or highway statutes. The principle has been applied in reference to rights accruing under a variety of statutes when affected by a subsequent change of the law. *Pacific Mail S. S. Co.* v. *Joliffe*, 2 Wall. 450; *Miller* v. *Union Mill Co.*, 45 Wash. 199; *Grey* v. *Mobile Trade Co.*, 55 Ala. 388; *Stephens* v. *Marshall*, 3 Pinney (Wis.) 203; *Gorman* v. *McArdle*, 67 Hun. 484, 22 N. Y. Supp. 479; *Westervelt* v. *Gregg*, 12 N. Y. 202; *Creighton* v. *Pragg*, 21 Cal. 115; *State Trust Co.* v. *Kansas City P. & G. H. Co.*, 115 Fed. 367."

The Court very clearly pointed out that the damages which Ettor had suffered were "consequential damages" and that, in the absence of the statute, there was no liability for such

damages (p. 150), but the Court also pointed out that the statute created the liability for such damages (p. 151). So also in this case, if it can be said that prior to the Settlement Act respondent was not entitled to the return of the property, it was given the right to such return by the Settlement Act. In the *Ettor* case, the Court pointed out that the damage had been done and nothing remained to be done except the ascertainment of the amount of such damage. So also in this case, respondent complied with all the provisions of the statute, including that of giving the consent, and nothing remained to be done except the delivery of 80% of the property to it. In the *Ettor* case, the Court held that the right of Ettor to his damages was fixed by the law in force when his property was damaged and that such right was then a vested right which could not be defeated by subsequent legislation. So also in this case, the right of respondent to the return of 80% of the property was fixed by the law in force when it consented to the postponement of the return of 20% thereof and the use of the same by the United States and such right was then a vested right which could not be defeated by the "subsequent legislation" to wit, Public Resolution 53.

In *Coombes* v. *Getz*, 285 U. S. 434, the following facts appeared: The California constitution contained a section providing that directors of corporations should be liable to creditors for all moneys embezzled or misappropriated by corporate officers. Another section reserved in the legislature the power to alter or repeal any further laws concerning corporations. Plaintiffs, who had contracted with the corporation while these provisions were in force, brought suit to enforce the constitutional liability against the defendant, a director of the corporation, for money misap-

propriated by officers of the corporation. While this action was pending, the legislature repealed the section making the directors liable. This Court held that the statute repealing this section was unconstitutional as to the plaintiffs, on the ground that it contravened both the contract impairment clause and the due process clause of the United States Constitution. The opinion in that case delivered by Mr. Justice Sutherland, contained the following language (p. 442):

> "The right of this petitioner to enforce respondent's liability had become fully perfected and vested prior to the repeal of the liability provision. His cause of action was not *purely* statutory. It did not arise upon the constitutional rule of law, but upon the contractual liability created in pursuance of the rule. Although the latter derived its being from the former, it immediately acquired an independent existence competent to survive the destruction of the provision which gave it birth. The repeal put an end to the rule for the future, but it did not and could not destroy or impair the previously vested right of the creditor (which in every sense was a property right, *Ettor* v. *Tacoma*, 228 U. S. 148, 156; *Pritchard* v. *Norton*, 106 U. S. 124, 132) to enforce his cause of action upon the contract. *Ettor* v. *Tacoma, supra; Hawthorne* v. *Calef*, 2 Wall. 10; *Steamship Co.* v. *Joliffe*, 2 Wall. 450; *Ochiltree* v. *Railroad Co.*, 21 Wall. 249, 252-253; *Harrison* v. *Remington Paper Co.*, 140 Fed. 385, 390, *et seq.*; *Knickerbocker Trust Co.* v. *Myers*, 133 Fed. 764, 767."

and at page 448:

> "It is settled by decisions of this and other federal courts (*Ettor* v. *Tacoma*, and cases cited in connection therewith, *supra*) that, upon the facts

> here disclosed, a contractual obligation arose; and the right to enforce it, having become vested, comes within the protection of both the contract impairment clause in Art. 1, § 10, and the due process of law clause in the Fourteenth Amendment of the Federal Constitution."

Obviously, there was, in the absence of the constitutional provision, no liability of the director for the derelictions of the officer, but the constitution created such liability. So also in this case, if it can be said that there was no liability of the defendants prior to the Settlement Act for the return of the property, that Act created such liability. In the *Coombes* case, the Court held that the defendant therein was a director when the defalcation occurred and that the right of plaintiff existed under the constitution at that time and that the right was a vested right coming within the protection of the due process clause of the Constitution. So also in this case, the right of respondent to the return of 80% of the property existed under the Settlement Act when it filed its consent, pursuant to said Act, to the postponement of the payment of 20% thereof and the use thereof by the United States, and its right is a vested right coming within the protection of the due process clause of the Constitution.

"A law can be repealed by the lawgiver; but rights which have been acquired under it, while it was in force, do not thereby cease. It would be an act of absolute injustice to abolish with the law all the effects which it had produced. *Sutherland on Statutory Construction* ~~108.~~ Vol 2. (2nd Ed.) p. 1217.

IV.

Postponement of the return of property, like the postponement of the payment of a debt, constitutes a deprivation of property just as much as the taking of the property itself.

In *Louisiana* v. *New Orleans,* 102 U. S. 203, Justice Field said at page 207:

> "The Latin proverb, *qui cito dab bis dat,*—he who gives quickly gives twice,—has its counterpart in a maxim equally sound,—*qui serius solvit, minus solvit,*—he who pays too late, pays less."

If the United States Government, through Congress, has revested the title in the former owner, or directed the immediate return of the property and such return is thereafter postponed by the Act of Congress, such Act of Congress lessens the value of that property to the former owner, and if no compensation is given for such taking such postponement of the return of the property is just as much a deprivation of property as the taking of part of the property itself.

A vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference, and whether it springs from contract or from the principles of the common law, it is not competent for the legislature to take it away.

> *Pritchard* v. *Norton,* 106 U. S. 124;
> *Johnson* v. *Jones,* 44 Ill. 142.

A statute impairs the obligation of a contract if it prevents its enforcement, or tends to postpone or retard en-

forcement, or seriously interfere with the enforcement of the contract.

> *McGahey* v. *Virginia,* 135 U. S. 662;
> *Louisiana* v. *New Orleans,* 102 U. S. 203;
> *Seibert* v. *Lewis,* 122 U. S. 284;
> *South Carolina* v. *Gaillard,* 101 U. S. 437.

In the case of *People* v. *Hawkins,* 157 N. Y. 1 (51 N. E. 257) the Court said as follows (p. 7):

> "The citizen cannot be deprived of his property without due process of law. The principle embodied in this constitutional guaranty is not limited to the physical taking of property. Any law which annihilates its value, restricts its use, or takes away any of its essential attributes, comes within the purview of this limitation upon legislative power. The validity of all such laws is to be tested by the purpose of their enactment and the practical effect and operation that they may have upon property. A law which interferes with property by depriving the owner of the profitable and free use of it, or hampers him in the application of it for the purposes of trade or commerce, or imposes conditions upon the right to hold or sell it, may seriously impair its value, against which the Constitution is a protection."

Under the guise of a mere "postponement" of the return of this vested property, the Joint Resolution actually confiscates it. For it cannot be returned (except in the President's discretion), until Germany has paid its debt to the United States, which may never be. Such failure to pay, up to the present time, is either due to Germany's inability to pay, or to its unwillingness. There is nothing

to indicate that its ability to pay will increase in the future; or that, if it be unwillingness, its attitude will change. In either event, a withholding until the occurrence of something that may never happen, is outright confiscation with not even a provision for interest in the meantime. Under such circumstances the use of the word "postponement" is not even comportable with the policy of a government which throughout its history has disdained the exercise of the power of confiscation.

V.

Public Resolution 53, involving complete delegation of legislative powers by Congress to the President, falls directly within the condemnation in the cases of *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, and *Schechter* v. *United States*, 295 U. S. 495.

In the case of *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, Chief Justice Hughes said (p. 415):

> "* * * Section 9 (c) does not state whether or in what circumstances or under what conditions the President is to prohibit the transportation of the amount of petroleum or petroleum products produced in excess of the state's permission. It establishes no criterion to govern the President's course. It does not require any finding by the President as a condition of his action. The Congress in section 9 (c) thus declares no policy as to the transportation of the excess production. So far as this section is concerned, it gives to the President an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit.

> And disobedience to his order is made a crime punishable by fine and imprisonment."

and at page 421:

> "The Constitution provides that 'All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.' Article 1, § 1. And the Congress is empowered 'To make all laws which shall be necessary and proper for carrying into Execution' its general powers. Article 1, § 8, par. 18. The Congress manifestly is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested."

In the case of *A. L. A. Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, 537-538, Chief Justice Hughes said:

> "* * * But Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry."

In Public Resolution 53 the President is given absolute discretion as to when the ban provided for by the Resolution should be lifted. No standards are set by Congress, and clearly the Resolution is an abdication of legislative power belonging to Congress.

The Annual Report of the Secretary of the Treasury on the State of the Finances for Fiscal Year Ended June 30, 1935 indicates that the restriction was removed as regarding a German national who received an award from the War Claims Arbiter. In said report the following is stated (p. 64):

"Fifty percent of the award in favor of the estate of a German national was paid during the fiscal year following removal by the President of the restrictions of Public Resolution No. 53, approved June 27, 1934, upon recommendation by the Secretary of the Treasury."*

VI.

If Public Resolution No. 53 be unconstitutional then respondent is entitled to the return of its property, and it is immaterial whether this action is regarded as an action against the United States or against the present holder of the property belonging to the respondent.

Our contention is that Public Resolution No. 53 is unconstitutional. If that act be unconstitutional respondent is entitled to the return of the property and respondent is entitled to bring suit under Section 9 of the Trading with the Enemy Act. The pertinent provisions of that section are set forth as Appendix A of this brief.

Therefore, it is immaterial whether or not this is a suit against the United States.

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*NOTE: On page 14 of the Government's brief (footnote) it is stated that the President has lifted the restriction by two executive orders mentioned in that note. No mention is made of the executive order by which the ban was lifted, as above stated, as to a German national. Therefore, the statement contained on page 14 is misleading.

The further statement that the restriction is limited by Congress itself to German nationals, is also misleading because there is no restriction imposed by Congress as to the President's power.

This unlimited restriction is in violation of the ruling contained in the cases referred to under this point.

VII.

Taking for granted that the Treaty of Berlin empowered Congress permanently to confiscate German property, Congress not having availed itself of that power, but having, subsequent to the Treaty of Berlin, passed the Settlement of War Claims Act, the Treaty of Berlin is immaterial.

It is contended by the petitioners that the Treaty of Berlin expressly reserved the privileges accorded to the allies under Article 297, Section IV, Part X of the Treaty of Versailles.

The pertinent provision of the Treaty of Berlin (November 14, 1921, U. S. Stat. L., Vol. 42, part 2, p. 1938) is as follows (Trading with the Enemy Act by Meares, p. 512):

"ARTICLE I.

"Germany undertakes to accord to the United States and the United States shall have and enjoy, all the rights, privileges, indemnities, reparations or advantages specified in the aforesaid Joint Resolution of the Congress of the United States of July 2, 1921, including all the rights and advantages stipulated for the benefit of the United States in the Treaty of Versailles which the United States shall fully enjoy notwithstanding the fact that such Treaty has not been ratified by the United States.

"ARTICLE II.

"With a view to defining more particularly the obligations of Germany under the foregoing Article

with respect to certain provisions in the Treaty of Versailles, it is understood and agreed between the High Contracting Parties:

"(1) That the rights and advantages stipulated in that Treaty for the benefit of the United States, which it is intended the United States shall have and enjoy, are those defined in Section 1, of Part IV, and Parts V, VI, VIII, IX, X, XI, XII, XIV, and XV."

Paragraph 1 of the Annex to Article 297, Section IV, Part X, of the Treaty of Versailles contains the following provision:

"Every action taken with regard to any property, business, or company, whether as regards its investigation, sequestration, compulsory administration, use, requisition, supervision, or winding up, the sale or management of property, rights, or interest, the collection or discharge of debts, the payment of costs, charges, or expenses, or any other matter, whatsoever, in pursuance of orders, directions, decisions, or instructions of any court or of any department of the Government of any of the High Contracting Parties, made or given, or purporting to be made or given, in pursuance of war legislation with regard to enemy property, rights or interests, is confirmed."

A reading of these provisions indicates that any act performed by way of compulsory disposition of the property is thereby ratified. Therefore, any sale of the property in its original state is thereby ratified, and any permanent confiscation, if such had taken place, would have been ratified. But nowhere in any of the provisions cited is there any statement that the disposition made by Con-

gress after the enactment of this Treaty, namely, the return thereof, shall be deemed ineffectual.

Consequently these provisions of the Treaty of Berlin and the Treaty of Versailles are utterly immaterial. They might have authorized a permanent confiscation had Congress seen fit to do so, but Congress did not take advantage of the privilege of permanent confiscation which might have been undertaken as an exceptional war measure. Congress wisely did not adopt this policy.

In this connection, it is noted that, throughout their Brief, petitioners stress the rights of the United States under Article II of the Treaty of Berlin. Little or no reference is made by them to the facts that Article II of the Treaty purports to carry out Section 2 of the Peace Resolution of 1921 and that Section 5 of the Peace Resolution, which is made a part of the Treaty, *is the Section which specifically has to do with enemy property.* As was pointed out by the Committee of Finance of the Senate (Report 273—70th Congress—1st Session) Section 5 of the Peace Resolution, which is part of the Treaty, and provides that the United States will hold the property until Germany shall have made suitable provision for the satisfaction of claims, is inconsistent with the rights of the United States, under Article II of the Treaty, to liquidate the property and apply its proceeds to the payment of such claims. As the Committee pointed out (p. 13):

> "The only interpretation which will reconcile these provisions is that the United States specifically reserved the right to use the German property for the settlement of American claims *only if suitable provision were not made by the German Government for the settlement of American claims.*" (Italics ours.)

It seems clear that the construction given to the provisions by the Committee on Finance is the only logical and sensible construction which could be given to them. In the one section, the United States can confiscate the property; in the other it must make "no disposition" of it "until such time as the Imperial German Government * * * or their successor * * * shall have * * * made suitable provision for the satisfaction of all claims". The "suitable provision" was made and, when it was made, the United States, conformable with its treaty obligation, made "disposition" of the property by providing, in the Settlement of War Claims Act, for the immediate return of 80% thereof and the temporary retention of the remaining 20%. Granting, then, the power to confiscate under Article II, it must also be granted, and cannot logically be denied, that Congress, having determined that suitable provision had been made, provided, as it was by treaty bound to provide, for the return of the property to the owners.

VIII.

Respondent is not precluded by the Treaty of Berlin from questioning the validity of Public Resolution 53.

In their Point II (Brief, pp. 24-29), petitioners argue that the Treaty of Berlin precludes respondent from questioning the validity of Public Resolution 53.

It is here to be emphasized that we are not here dealing with a case where it is sought to invalidate or to avoid the legal and binding effect of sales or other dispositions by the Alien Property Custodian of alien property, as was the situation in the cases of *Klein* v. *Palmer,* 18 Fed. (2d), 932;

Munich Reinsurance Co. v. *First Reinsurance Co.*, 6 Fed. (2d) 742; *Lange* v. *Wingrave*, 295 Fed. 565 and *United States* v. *Chemical Foundation*, 272 U. S. 1, cited by petitioners. Nor do we question that the Treaty of Berlin effectively precluded recovery in those cases.

But we submit that the Treaty of Berlin does not either directly or impliedly destroy the fundamental proposition that the protection of the Fifth Amendment to the Constitution is afforded as much to a German as it is to a citizen of the United States.

That a citizen of Germany may not bring suit against the United States without its consent is a self-evident fact and that, when debarred from bringing such suit, he must seek redress through his government is equally self-evident. But where he is given the right to sue the United States, he most certainly may avail himself of such right, whether or not he might also pursue his claim through his own government.

The case of *United States* v. *Dickelman*, 92 U. S. 520, asserts no contrary principle. Petitioners' quotation therefrom is significant only in what it omits. The suit was brought in the Court of Claims under a jurisdictional act "for its decision in accordance with law". This Court pointed out that the law involved was a Treaty with Prussia. After pointing out that the usual procedure in the matter of a claim of a foreign citizen against the United States, is through his own government, this Court stated that the claimant had so presented his claim and that (p. 524):

> "* * * Subsequently, Congress, by joint resolution, referred the matter to the Court of Claim *'for its decision according to law'. The Courts of the United*

> *States were thus opened to Dickelman for this proceeding.* In this way the United States have submitted to the Court of Claims, and through that court upon appeal to us, the determination of the question of their legal liability under all the circumstances of this case for the payment of damages to a citizen of Prussia upon a claim originally presented by his sovereign in his behalf." (Italics ours.)

And the Court proceeded to consider his right, not to bring the suit, but to the damages claimed, on the law as found in "the treaty between the two governments, as well as under the general law of nations".

As we pointed out hereinbefore, respondent has the right to bring this suit under the provisions of Section 9 of the Act and there is nothing in Public Resolution 53 which takes away that right. It certainly would not seriously be urged that, by the Treaty of Berlin, the United States would enjoy the right to reseize the property which it has already disposed of to the owners thereof. If respondent has, as we contend, obtained a vested interest in the property here claimed, and if his right to sue under the laws of the United States still exists, as we contend, then it is clear that the provisions of the Treaty of Berlin, upon which petitioners rely, in no way affect such rights. In fine, respondent, by the Settlement of War Claims Act of 1928, was given the right to the return of his property under the provisions and conditions thereof; it complied with such conditions and, in doing so, it obtained a vested right in its property; it was given by said Act the right to pursue its claim in our courts; its vested right cannot, under our Constitution, be destroyed; and the United States can no more deprive it of such vested rights by resort to the Treaty of Berlin than it could, by similar resort, resieze property which it has al-

ready disposed of to owners under the Settlement of War Claims Act.

In this connection, it is noted that petitioners state at page 28 of their Brief that they have been advised:

> "by the Secretary of State that the German Government has made no claim that the Resolution is in conflict with these treaties. Nor has the German Government suggested that the Treaty of Berlin does not contain plenary authority for such action by the United States. This construction of the treaty by the political departments of the parties to it indicates that this Resolution cannot be considered as inconsistent with it."

There is nothing before the Court corroborating this statement. In fact, we have been informed that the German Government did protest orally and in writing against Public Resolution No. 53.

However, it does not follow that if the German Government has made no protest that it approves the action of Congress or of the respondent acting under the Act of Congress, and we challenge petitioners to demonstrate any affirmative statement by the German Government that makes any claim that the Resolution is not in conflict with this Treaty and that it agrees that the Treaty of Berlin contains any authority for Public Resolution No. 53.

There is no basis for the contention on the part of the Government that the Treaty of Berlin has been construed by the political departments in such fashion as claimed here.

Certainly, the respondent is bound by the Treaty of its sovereign, but the Treaty which binds it is the present

Treaty,* as fortified by our Constitution, which accords to alien friends rights and privileges of Amendment 5 of the Constitution.

See *Russian Volunteer Fleet* v. *United States,* 282 U. S. 481 (51 S. Ct. 229), where it was held that a Russian corporation, being an alien friend, even before recognition of Russia, was entitled to the protection of the Fifth Amendment of the Federal Constitution.

On page 46 of the Petitioners' brief it is stated that the respondent cannot complain because the German Government has obligated itself to pay it the "just compensation" which the respondent asserts is demanded by the Fifth Amendment, and the Petitioners quote paragraph (i) of Article 297 of Section IV, Part X of the Treaty of Berlin, providing that

> "Germany undertakes to compensate her nationals in respect of the sale or retention of their property, rights or interest in Allied or Associated States."

With regard to this undertaking, Charles C. Hyde, formerly Solicitor of the Department of State, has written as follows:

> "Inasmuch, however, as the actual value of that undertaking was necessarily slight by reason of the fiscal burden imposed upon the German territorial sovereign, the agreement signified consent

*NOTE: The Treaty between the United States and Germany (44 Stat. (Part 3) 2132) contains the following:

"The nationals of each High Contracting Party shall receive within the territories of the other, upon submitting to conditions imposed upon its nationals, the most constant protection and security for their persons and property, and shall enjoy in this respect that degree of protection that is required by international law. Their property shall not be taken without due process of law and without payment of just compensation."

> to what amounted to a practical confiscation of private property by its enemies." (International Law, vol. 2, pp. 240-241.)

Furthermore, it seems to be contended by the Petitioners that the Treaty of Berlin can be interpreted as depriving German nationals of property, the beneficial interest in which is already vested in them. That contention of the Petitioners seem to be contrary to the statement of this Court, oft quoted, made in *The Cherokee Tobacco*, 11 Wall. 616, 620:

> "It need hardly be said that a treaty cannot change the Constitution or be held valid if it be in violation of that instrument."

To the same effect, see: 2 Hyde International Law, page 9, where the following is stated:

> "An independent State is deemed to possess the broadest right to enter into international agreements. Its constitution may, however, in various ways limit and regulate the exercise of the right, restricting the conclusion of treaties designed to effect certain objects, or prescribing the method by which the State shall give its consent to certain classes of engagements. An unconstitutional treaty must be regarded as void."

This statement of the author is fortified by the following note:

> "'Indeed a treaty which undertook to take away what the Constitution secured or to enlarge the Federal jurisdiction would simply be void.' Fuller, *C.J.*, in *Downes* v. *Bidwell*, 182 U. S. 244, 370. 'It need hardly be said that a treaty cannot change the

Constitution or be held valid if it be in violation of that instrument.' Swayne, *J.*, in *The Cherokee Tobacco,* 11 Wall. 616, 620."

IX.

The rights acquired by respondent, being vested rights, were not limited or destroyed by any provisions in treaties or agreements between the United States and Germany.

At pages 41 *et seq.* of their Brief, petitioners argue that Congress had the right to invalidate any contractual right gained by respondent because such right of Congress "was reserved by Congress in legislation—including treaties or agreements binding upon respondent—at the time the alleged contract was made".

Here again petitioners allude to the Treaty of Berlin in which there is incorporated the provision of the Treaty of Versailles in which the United States reserves the power to take measures with regard to enemy property "which have had or will have the effect of removing from the proprietors the power of disposition over their property". It should be borne in mind that the Treaty of Versailles was negotiated in 1919, and was never ratified by the United States and that the Treaty of Berlin became effective November 14, 1921.

A measure subsequently taken with respect to enemy property was that of the Settlement of War Claims Act of March 10, 1928, whereby Congress ordained that all of the property should eventually be returned to the German owners and that 80% of it should be immediately returned upon the agreement of the owner that the remaining 20% could be held and used by the United States.

And while that Act was in force and millions in property were being returned thereunder to the owners, Germany and the United States entered into the Debt-Funding Agreement of June 23, 1930. And the United States there agreed to accept the full faith and credit of Germany "as the only security and guaranty" for the fulfillment of Germany's obligations to the United States and its nationals; that the evidence of such indebtedness should be the bonds of Germany which this country has accepted and has never returned; that Germany should occupy the same position as to its debts as do the other sovereign debtors of the United States occupy as to their debts; and that the United States was bound to release property which Congress had theretofore authorized to be released.

Now, in 1936, we are told that we must go back to the Treaty of Berlin of 1921 and must ignore the Settlement of War Claims Act of 1928 and the Debt-Funding Agreement of 1930 and we must do so because Congress desires to hold the paltry 5% of German property still in the hands of petitioners as a club to compel defaulted payments under the Debt-Funding Agreement. We must ignore the fact that the United States agreed "to accept the full faith and credit of Germany as the only security"; we must ignore the fact that the United States agreed that "Germany will be in the same position" as the other sovereign debtors of the United States; we must ignore the fact that the United States agreed to release German property which it held and which Congress had, prior to the debt-funding agreement of 1930 and by the Settlement of War Claims Act of 1928, authorized to be released to the German owners. If, as petitioners argue, we are to read into respondent's contract the "legislation including treaties or agreements * * * ", why

read only the Treaty of Berlin and Public Resolution 53; why omit the Settlement of War Claims Act and the Debt-Funding Agreement of 1930? The answer is clear, namely, that the inclusion of the provisions of the Settlement of War Claims Act and of the Debt-Funding Agreement with those of Public Resolution 53 does not make a picture which portrays the spirit, and the honor of this country.

We have hereinbefore emphasized that the whole history of the legislation, the whole framework of the Act, and the whole course of conduct of this Government thereunder, prior to Public Resolution 53, was that of sequestration, not of confiscation; that of holding in trust for the owners, not that of ultimate deprivation; that of recognition of an ultimate right of return, not that of a denial of such ultimate right; that of return, not that of holding it as a club to compel payment of reparations and awards by Germany; that of a recognition of the principle, as stated by this Court in *Russian Volunteer Fleet* v. *United States*, 282 U. S. 481, 491-2, that the standards of our Government are "not dependent upon the standards of other governments".

Of one thing we may be certain, namely, that Congress recognized in 1930 that a measure which, under the Treaty of Berlin of 1921, it was not required to take, it had effectively and irrevocably taken in 1928 when it ordained the return of property to the German owners because in the Debt-Funding Agreement of 1930, which was executed by the express authority of Congress (Act of June 5, 1930—Pub. No. 307—71st Congress), it agreed that the United States was thereby required to release property which it had already authorized to be released.

More than certain is it that Congress intended to provide and did provide, in the Settlement of War Claims Act

of 1928, for the return of all the property; that it intended to and did authorize the immediate payment of 80% thereof; that it intended to and did temporarily withhold the remaining 20% only upon the agreement of the owner to such retention; that it intended to and did effectively provide that the agreement of the United States to pay and deliver the 80% in consideration of the agreement of the owner to the retention of the 20% should constitute a contract between the United States and the owner; and that Congress recognized, as must all recognize, that the contract so made gave to the owner a vested right in property of which he could not constitutionally be deprived by any subsequent legislation of Congress.

Cases cited by petitioners to the point that a treaty may be superseded by a law of Congress are not in point. In none of them was there involved the question of the inviolability of a vested right in property. In the cases of *Whitney* v. *Robertson,* 124 U. S. 190 and the *Head Money Cases,* 112 U. S. 580, there was involved the right of the United States to exact duties under laws of Congress which were said to be in conflict with treaties. In the case of *Chae Chan Ping* v. *United States,* 130 U. S. 581, the plaintiff claimed the right to reenter this country under a treaty with China and notwithstanding his debarrment under a subsequent Act of Congress. The case is appropriate, however, on the proposition that the vested rights of foreigners in property are protected by the Fifth Amendment to the Constitution. At page 609, this Court stated:

> "* * * The rights and interests created by a treaty, which have become so vested that its expiration or abrogation will not destroy or impair them,

are such as are connected with and lie in property, capable of sale and transfer or other disposition, not such as are personal and untransferable in their character." (Italics ours.)

CONCLUSION

Wherefore, we respectfully submit that the decision below should be affirmed.

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